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IN THE

Supreme Court of the United States

October Term, 1956.

No. 613

VALLEY BELL DAIRY CO., INC., a corporation,
FAIRMONT FOODS COMPANY, a corporation,
BEATRICE FOODS CO., INC., a corporation,
MOUNT VERNON FARM DAIRY PRODUCTS, INC., a corporation,
FISHER A. BONHAM, JOHN T. BONHAM, ESTA E. BONHAM, and KATHRYN B. SINES, Partners trading as BONHAM'S DAIRY,
DAIRYMEN'S COOPERATIVE SALES ASSOCIATION, a corporation, and
The Honorable BEN MOORE, Judge of the United States District Court for the Southern District of West Virginia,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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The Honorable BEN MOORE, Judge of the United States District Court for the Southern District of West Virginia,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

The petitioners, Valley Bell Dairy Co., Inc., a corporation, Fairmont Foods Company, a corporation, Beatrice Foods Co., Inc., a corporation, Mount Vernon Farm Dairy Products, Inc., a corporation, Fisher A. Bonham, John T. Bonham, Esta E. Bonham, and Kathryn B. Sines, Partners trading as Bonham's Dairy, Dairymen's Cooperative Sales Association, a corporation, (sometimes hereinafter called the "corporate petitioners") and The Honorable Ben Moore, Judge of the United States District Court for the Southern Dis-

trict of West Virginia, pray that a writ of certiorari do issue from the Supreme Court of the United States to review a decision and judgment of the United States Court of Appeals for the Fourth Circuit made and entered on November 13, 1956, by which there was granted by said Court of Appeals a writ of mandamus directing the petitioner The Honorable Ben Moore, Judge of the United States District Court for the Southern District of West Virginia, to vacate an order excusing from further service unless recalled a grand jury which had been investigating the milk industry in the Charleston, West Virginia, area to determine whether there had been violations of the Antitrust Laws of the United States of America; to vacate an order quashing, in part, a subpoena duces tecum which, prior to the convening of the grand jury, had been issued at the request of attorneys in the Antitrust Division of the United States Department of Justice (sometimes hereinafter referred to as "government attorneys") requiring the petitioner Valley Bell to produce certain books and records; and to vacate an order imposing conditions upon the possession and use by said attorneys of a transcript of the testimony taken before the grand jury and limiting such use to the conduct of a thorough investigation, the preparation of the indictment or indictments, if made, and the preparation for trial upon such indictment or indictments as might be made.

OPINION BELOW

The decision and judgment sought to be reviewed were made and entered in an original proceeding for mandamus filed in the United States Court of Appeals for the Fourth Circuit by the United States of America against the United States District Court for the South-

ern District of West Virginia and The Honorable Ben Moore, Judge of the United States District Court for the Southern District of West Virginia; and, upon their motion to intervene, the corporate petitioners herein were made parties defendant by said Court of Appeals. The opinion of said Court of Appeals was rendered and the judgment thereon entered on the 13th day of November, 1956, and said opinion and the judgment thereon are filed as appendices to this petition. The opinion of said Court of Appeals is not yet reported.

JURISDICTION

The judgment of said Court of Appeals was entered on November 13, 1956.

No rehearing has been sought and there has been no extension of time within which to petition for certiorari. By order entered on the 26th day of November, 1956, said Court of Appeals stayed further proceedings in the matter pending this application to the Supreme Court of the United States for a writ of certiorari to said Court of Appeals, unless otherwise ordered by said Court of Appeals or the Supreme Court of the United States, provided the application for a writ of certiorari be filed in said Supreme Court within fifteen days from November 26, 1956. A copy of said order is filed as an appendix to this petition.

It is believed that 28 USC 1254(1) is the statutory provision which confers upon this Court jurisdiction to review the said decision and judgment of said Court of Appeals by writ of certiorari.

QUESTIONS PRESENTED

1. Whether the "All Writs Act" (28 USC 1651 (a)) or the "Judicial Council Act" (28 USC 332) either

or both, confers jurisdiction upon Courts of Appeals to review by mandamus and to order to be vacated a District Court's orders excusing a grand jury from further service unless recalled, quashing a subpoena duces tecum to produce books and records before a grand jury, and limiting the use by attorneys of the Antitrust Division of a transcript of the testimony taken before a grand jury to the purposes of the grand jury investigation, the investigation, the preparation of indictments, if made, and the preparation for trial upon such indictments, if made, there being no indictment?

2. Whether a grand jury investigation—and before any indictment is returned and before there is any specific case, controversy, or litigation arising therefrom —is such a case, controversy, or litigation in respect to which Courts of Appeals have actual or potential appellate jurisdiction under which Courts of Appeals may review, under the "All Writs Act" or the "Judicial Council Act", orders of the District Court made in connection with and in respect to a grand jury investigation by a grand jury impaneled by said District Court?

3. Whether a District Court, in continuing in session or in excusing a grand jury impaneled by it (Rule 6(g) Federal Rules of Criminal Procedure) exercises, upon the facts of this case, judicial discretion; and, if so, whether such judicial discretion is controllable by the Court of Appeals by mandamus?

4. Whether a District Court, in acting upon a motion to quash a subpoena duces tecum for the production of books and records before a grand jury (Rule 17(c) Federal Rules of Criminal Procedure), exercises judicial discretion, and, if so, whether such judi-

cial discretion is controllable by the Court of Appeals by mandamus?

5. Whether a District Court has jurisdiction to take any action calculated to prevent the use of a transcript of the testimony taken before a grand jury for purposes other than the purposes of the grand jury (Rule 6(e) Federal Rules of Criminal Procedure); that is to say, the investigation, the preparation of an indictment or indictments if made, and the preparation for trial upon such indictment or indictments in the event such be made; and, if so, is judicial action of the District Court exercised under such jurisdiction controllable by the Court of Appeals by mandamus?

STATUTES AND RULES INVOLVED

The pertinent provision of the "All Writs Act" (28 USC 1651 (a)) reads as follows:

> "§ 1651. WRITS
>
> "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The "Judicial Council Act" (28 USC 332) reads as follows:

> "§ 332. JUDICIAL COUNCILS
>
> "The chief judge of each circuit shall call, at least twice in each year and at such places as he may designate, a council of the circuit judges for the circuit, in active service, at which he shall preside. Each circuit judge, unless excused by the chief judge, shall attend all sessions of the council.

"The council shall be known as the Judicial Council of the circuit.

"The chief judge shall submit to the council the quarterly reports of the Director of the Administrative Office of the United States Courts. The council shall take such action thereon as may be necessary.

"Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council."

Rule 17(c) of the Federal Rules of Criminal Procedure reads as follows:

"Rule 17. SUBPOENA

"* * *

"(c) **For Production of Documentary Evidence and of Objects.** A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys."

Rules 6(d), 6(e), and 6(g) of the Federal Rules of Criminal Procedure read as follows:

"Rule 6. THE GRAND JURY

"* * *

"(d) **Who May be Present.** Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

"(e) **Secrecy of Proceedings and Disclosure.** Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

"* * *

"(g) **Discharge and Excuse.** A grand jury shall serve until discharged by the court but no grand jury may serve more than 18 months. The tenure and powers of a grand jury are not affected by the beginning or expiration of a term of court. At any time for cause shown the court

may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another person in place of the juror excused."

STATEMENT OF THE CASE

Pleadings

The petition of the United States of America was against the United States District Court for the Southern District of West Virginia and The Honorable Ben Moore, Judge of said District Court, and prayed that a writ of mandamus issue directing Judge Moore (1) to vacate the order inhibiting the grand jury from completing the investigation in which it was engaged, (2) to vacate the order imposing conditions upon delivery to the petitioner of the transcript of the grand jury proceedings, the testimony before the grand jury, and (3) to vacate the order granting the motion to quash a subpoena for the production of documents before the grand jury. (Tr.* 6)

The Honorable Ben Moore, believing that it was not proper for him to appear in the litigation in an adversary capacity, wrote a letter to the Chief Judge of the Court of Appeals with copies for the other Judges of said Court, and by said letter presented the reasons for his having entered the orders complained of and suggested that the corporate petitioners might appear in opposition to the petition for mandamus (A. 35a, Tr. 231); and the Court of Appeals treated the said letter as an answer of Judge Moore. A copy of said letter is filed as an appendix to this petition. (A.** 24a-36a, Tr. 231)

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* "Tr." indicates Transcript and page.

** "A" indicates Appendix and page.

A motion of the corporate petitioners to intervene, as defendants, was granted and they filed a motion to dismiss the petition for mandamus upon the grounds, in substance, that the Court of Appeals had no general supervisory powers or jurisdiction over the District Court and had no original jurisdiction other than the issuance of such writs as might be appropriate in aid of its appellate jurisdiction, and that there was not pending in the District Court any case or controversy, in respect to which the petition was relevant, which was or might become appealable to the Court of Appeals; and that, in sustaining the motion to quash the subpoena, in determining when the grand jury should be kept in session and when excused, and in imposing conditions upon the use of the transcript of the testimony before the grand jury, the District Court exercised judicial discretions and that such discretions were not subject to review or control by the Court of Appeals by mandamus, and that if the Court of Appeals had jurisdiction to review such judicial discretions of the District Court, then, from the record, it appeared clearly that the District Court had not abused its discretion in any instance. (Tr. 258,260)

Facts

The grand jury of the District Court was impaneled at the April, 1956 term of said court, performed its usual duties, and was excused, subject to be recalled, by the Court. Thereafter the Court, at the request of attorneys in the Antitrust Division of the Department of Justice of the United States, recalled the grand jury for April 30, and on that day gave its charge to the grand jury (Tr. 207, 227).

In the meantime, and before the grand jury was convened upon recall, the government attorneys caused

subpoenae duces tecum to be issued for the production of books, records, and papers and to be served upon the corporate petitioners, and particularly Valley Bell (Tr. 51).

Prior to the convening of the grand jury, counsel for Valley Bell moved the District Court to quash, in part, the subpoena duces tecum served upon it, upon the grounds that the subpoena was too broad and general and called for the production of books, records, and papers which had no materiality to the investigation; and upon the ground that the enforcement of such subpoena would constitute an unreasonable search (Tr. 10, 11, 15, 28 and 29).

The government attorneys resisted the motion and counsel for Valley Bell offered to produce for the Court's examination, to determine whether or not there was any materiality, the books, records, and papers (Tr. 41). The Court indicated that it would sustain the motion to quash unless materiality were shown (Tr. 52), observing that the subpoenas were issued at the instance of the government attorneys and not at the instance of the grand jury (Tr. 51-52). Thereafter, the grand jury presented to the Court a writing requesting the production of the records (Tr. 54-56). The request was initiated and the writing had been prepared by the government attorneys in advance of the grand jury's consideration of its interest in the records (Tr. 57, 62, 128), and the foreman of the grand jury stated that the government attorneys had not explained the materiality of the records to the grand jury and that the grand jury did not know of any materiality (Tr. 59, 61, 97, 121), though one grand juror said that so far as he was concerned, the request was based upon things that had been heard by the grand jury (Tr. 62).

The Judge repeatedly insisted that the government attorneys make some showing of materiality (Tr. 134). The government attorneys refused on the basis of the secrecy of the grand jury (Tr. 136-138), and the Court then sustained the motion to quash (Tr. 142).

The government attorneys had employed stenographers to take and transcribe the testimony before the grand jury (Tr. 99). The government attorneys took the position that the transcript of testimony was the absolute property of the Department of Justice (Tr. 246). The Court was of opinion that the transcript was not the absolute property of the Department of Justice, but, to the contrary, was a record of the grand jury and that, subject to proper use by the government attorneys, the transcript should be filed with the Clerk of the Court. Though at some earlier meetings with the government attorneys, the Court indicated a more restricted use of the transcript, the Court's final ruling in respect thereto was included in a letter dated May 25, 1956, from Judge Moore to the government attorneys (A. 4a-6a) (Tr. 185-186). The conditions imposed were:

> "2. I do agree with you gentlemen that it is proper for you to have from the stenographer a transcript of the evidence for the purpose of carrying out the duties which you list on page 5 of your brief, namely: '1) the conduct of a thorough investigation; 2) the preparation of the indictment; and 3) preparation for trial.'
> "3. You will be permitted therefore to receive from the stenographer a transcript of the evidence taken down by him, for the purposes mentioned. This means that if indictments are returned by the Grand Jury you will be permitted to retain the transcript insofar as it relates to persons or corporations then under indictment,

> for use in preparing for trial and prosecuting the cases to a conclusion. However, if no indictments are found by the Grand Jury or if certain persons or corporations under investigation are not indicted, the transcript relating to such persons or corporations as are not indicted will be returned to the Clerk of the Court as custodian thereof for the Grand Jury."

The letter also provided that receipt of the transcript from the stenographers by the government attorneys would constitute the latter's acceptance of such conditions of use. The government attorneys refused to accept the transcript upon the conditions stated.

On May 24, 1956, after the grand jury had been reconvened on April 30 and had since, except for a few days of recess, been in continuous session, the grand jury requested an adjournment until September 10, 1956, to enable the government attorneys to prepare a digest of the transcript of the testimony before the grand jury (Tr. 143-144). The Court stated that it did not think that such an extended adjournment would be in the interest of justice (Tr. 144-145). The Judge stated that he would be in the District for another ten days, and that the grand jury could remain in session until that time (Tr. 145).

On May 29, 1956 the grand jury appeared before Judge Moore and reported that it had adopted a resolution that it had nothing further to investigate at the time, and that it believed that it was not prepared to consider any indictments at the time, and none had been presented, and that the grand jury awaited further instructions from the Court (Tr. 147). At the same time the government attorneys stated to the Court, "We have nothing further to call to the grand

jury's attention, * * *" (Tr. 148), and further stated that the Department needed time to examine the transcript, to give their superiors an opportunity to consider the proposed indictments, and to prepare indictments if the Department wished to present proposed indictments (Tr. 148).

The Court suggested that if the grand jury were ready to vote for or against the indictments it should do so, and that if an indictment were voted it would be sealed and the Court would release the grand jury for such length of time as might be required by the government attorneys in drawing up the indictment, when the grand jury could then return and make the specific indictment, and suggested that the grand jury go into executive session and consider the matter (Tr. 149-150).

The grand jury did go into executive session, and thereafter reported to the Court, "Your Honor, we the grand jury have resolved to act on the court's instruction, that if it did not want to vote on the question of indictment at this time to so inform the court and the court would discharge the jury. We have so decided" (Tr. 165). The Court then stated that since the grand jury had arrived at that decision, "* * * I am going to excuse you now and you will not be required to come into session again unless you are called by the court, * * *", and further stated, "You will remain the grand jury of the court until the court calls another grand jury in connection with the November term, but you will not be required nor permitted to have any further sessions unless you are called in by the court, so you are now excused and you may claim your attendance at the clerk's office" (Tr. 166).

Thereafter there was no request by the government attorneys or by any member of the grand jury that the

grand jury be recalled to hear further testimony, and on September 28, 1956, the petition for mandamus was filed in the office of the Clerk of the Court of Appeals (Tr. 8), and by order of the 3rd day of October, 1956, the petition was officially filed by order of the Court of Appeals and the case was set for hearing on October 17, 1956 (Tr. 229), and was then argued and heard. As hereinbefore shown, the Court of Appeals on November 13, 1956 awarded the writ as prayed for.

The record in this case is rather unique in that, except for the motion of the petitioner Valley Bell, and other petitioners, to quash in part (Rule 17(c) of Federal Rules of Criminal Procedure) the subpoena duces tecum directed to them, the entire record of the appearances of the government attorneys and the grand jury before the Court is made up of the Court's instructions to the grand jury and directions to the government attorneys, and without the participation of counsel for the corporate petitioners. The motion to quash of Valley Bell was first made before the grand jury convened. Much of the record relates to the right of the government attorneys to the possession and use of a transcript of testimony taken before the grand jury.

From the initial charge to the grand jury to the end of the record it is obvious that the District Court was of the opinion (which counsel believe to be sound) that the grand jury was a part of the judicial branch of the government, while the Department of Justice, represented by the government attorneys, was a part of the executive branch, and that a proper separation of powers is essential to the preservation of constitutional liberties, and that the grand jury should not be used as an instrumentality of the executive branch of gov-

ernment, and should only be assisted and not dominated by the government attorneys.

The record also shows that on occasions the District Court felt that the government attorneys were attempting to use the grand jury to circumvent rulings of the District Court in respect to the activities of the government attorneys (A. 30a-31a). The record also shows that it is an acknowledged policy of the Department of Justice to utilize the subpoena powers of the grand jury to procure evidence for use in civil actions, although, to date, the Congress has not seen fit to clothe the Department of Justice with such subpoena powers, (Judge Moore's letter. A. 33a-35a, Tr. 238-239). See also *U. S.* v. *Procter & Gamble Co.*, 19 FRD 122, at 124; and Footnote 7.

The record clearly shows that the District Court considered the use of the subpoena powers of the grand jury for the purpose of procuring evidence for use in civil actions, or in fact for any use other than the purposes of the grand jury, to be an abuse of process and felt that the District Court had a duty to endeavor to see that the subpoena powers of the grand jury were not so abused. This related particularly to the transcript of the testimony taken before the grand jury. At one time the District Court stated that if indictments were returned, then the transcript might even be used in a civil action.

At no time did the government attorneys disclaim any purpose of using the evidence obtained by the grand jury and by its processes in a civil action.

BASIS OF FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

The United States District Court for the Southern District of West Virginia, the court of first instance, at the request of government attorneys in the Antitrust Division, pursuant to Rule 6(a) of Federal Rules of Criminal Procedure, had convened a grand jury previously summoned, and the orders complained of by the United States of America in its petition for mandamus related to the grand jury investigation.

THE PETITIONERS, WHICH BECAME PARTIES BY INTERVENTION, HAVE STANDING TO SEEK CERTIORARI

The petitioners, which became parties by intervention, having an interest in the subject matter of the cause of action, have the standing as parties litigant to have the decision of the Court of Appeals reviewed by the Supreme Court of the United States upon certiorari, the other requirements of certiorari being present.

> *International Union* v. *Eagle-Picher Mining &Smelting Company*, 325 U.S. 335, at 338-9;
>
> *Williams* v. *Morgan*, 111 U.S. 684, at 696-699.

The corporate petitioners are corporations and persons under investigation by the grand jury and have obvious interests in this cause, including, but not exclusive of others, their respective interests in their freedom from the burdens incident to the furnishing of witnesses and records for grand jury consideration and examination and their right to have the investiga-

tion in respect to them conducted in a lawful and orderly manner, such as the District Court endeavored to prescribe. The petitioner Valley Bell has a further and more particular interest, inasmuch as it was its motion to quash, in part, the subpoena duces tecum, and which motion was sustained by the District Court, and which action of the District Court the decision and judgment of the Court of Appeals directed to be vacated.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Fourth Circuit, in the decision sought to be reviewed:

(1) Has decided important questions of federal law which have not been, but should be, settled by this Court:

A. The Court of Appeals has decided that potential litigation which might arise, but which has not yet arisen, from a grand jury investigation, gives original jurisdiction to the Court of Appeals to exercise by mandamus supervision and control of the orders of the District Court by which the grand jury was impaneled in supposed aid or protection of the potential appellate jurisdiction of the Court of Appeals, even prior to the coming out of the grand jury investigation of any case, controversy, or litigation which might form the basis of actual or potential appellate jurisdiction of the Court of Appeals. In awarding the mandamus, the opinion of the Court of Appeals bases its original jurisdiction on the "All Writs Act" (28 USC 1651(a)) and/or the "Judicial Council Act" (28 USC 332).

Jurisdiction of United States Courts of Appeals is purely appellate, and the "writs" (28 USC 1651(a))

are available only in aid or in protection of such appellate jurisdiction, either invoked or potential. See: *United States* v. *Mayer*, 235 U. S. 55, at 65; *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, at 383; *Roche* v. *Evaporated Milk Association*, 319 U. S. 21, at 25; *Bankers Life & Cas. Co.* v. *Holland*, 346 U. S. 379, at 382.

That there is no review by appeal or certiorari, does not of itself give rise to jurisdiction in mandamus. See: *Ex parte Newman*, 14 Wall 152, at 168.

It is not believed that the "Judicial Council Act" (28 USC 332) is a jurisdictional statute. To the contrary, upon its face, it relates purely and simply to administrative matters. It is believed that this is the first case in which any court has suggested that the "Judicial Council Act" confers any judicial jurisdiction.

It is submitted that a grand jury investigation is an investigation only and is not a case or controversy, litigation, in respect to which the Court of Appeals has appellate jurisdiction. Such appellate jurisdiction may not be invoked, and therefore is not potential.

Of course litigation may come out of a grand jury investigation. When an indictment is returned there is litigation immediately, and potential appellate jurisdiction. When a contumacious witness is cited, there is litigation, and potential appellate jurisdiction, but the mere grand jury investigation is not litigation. See *Federal Power Com.* v. *Metropolitan Edison Co., supra.*

What the learned Court of Appeals has done in this case is to predicate *potential appellate jurisdiction* upon *potential litigation.* It is submitted that such a

position is not supported by either principle or precedent. If jurisdiction of the United States Court of Appeals can be predicated upon potential litigation, then obviously there are no limits to or upon the jurisdiction of said Courts, and Courts of Appeals then have general supervisory powers over all actions of District Courts.

It is believed that this Court has not heretofore settled the matter of jurisdiction or lack of jurisdiction of Courts of Appeals over the proceedings and decrees of District Courts in respect to grand jury proceedings. This is believed to be an important federal question which should be settled by this Court.

B. The Court of Appeals has held that the District Court may not impose any conditions in respect to the ownership, possession, and use by attorneys of the Antitrust Division of a transcript of testimony before the grand jury. This is believed to be an important federal question which this Court has not settled but should settle.

There are decisions of lower Federal Courts that it is a subversion or abuse of the processes of the court in which the grand jury is serving to use evidence procured by such processes for purposes other than the purposes of the particular grand jury investigation, especially for use in civil actions.

A leading case is, *In re National Window Glass Workers*, D. C., N. D. Ohio, E. D. (1922), 287 F. 219, at 225, wherein, after stating, "* * * A grand jury has no existence aside from the court which calls it into existence and * * * does not become, after it is summoned, impaneled, and sworn, an independent

planet * * * in the judicial system, * * *", it is observed: "* * * A grand jury is not, therefore, and cannot become, an independent, self-functioning, uncontrollable agency. *It is and remains a grand jury attending on the court, and does not, after it is organized, become an independent body, functioning at its uncontrolled will, or the will of the district attorney or special assistant.*" (Emphasis that of counsel.)

The principles of the *National Window Glass* case are adopted in *Wilson* v. *United States*, C. C. of A., 8th. (1935), 77 F. 2d 236, at 242, wherein, in quoting from the *National Window Glass* case, it is said:

> "The process by which witnesses are compelled to attend a grand jury investigation is the court's process and not the process of the grand jury, nor of the district attorney. * * * A supervisory duty not only exists, but is imposed upon the court, to see that its grand jury and its process are not abused, or used for purposes of oppression and injustice."

See also generally: *United States* v. *Proctor & Gamble Co.* (1956) 19 F.R.D. 122, at 124, and *United States* v. *Proctor & Gamble Co.*, 19 F.R.D. 149, at 150.

See also generally: *United States* v. *Martel* (1954), U.S.D.C., N.D. New York, 17 F.R.D. 326.

(2) Has rendered a decision in conflict with the decision of another Court of Appeals on substantially the same matter.

In holding that the District Court could not impose any conditions or limitation upon the possession or use by attorneys in the Antitrust Division of a transcript of the testimony before the grand jury, even though

said government attorneys at no time disclaimed any purpose to use said transcript for purposes of a civil action, the Court of Appeals for the Fourth Circuit has held that District Courts have no duty or power to enter orders calculated to prevent the subversion of the processes of the District Court incident to the grand jury investigation for purposes other than the lawful grand jury purposes of investigating crimes and considering indictments, while, on the same day, the Court of Appeals for the 7th Circuit rendered its decision in *In the Matter of April, 1956 Term Grand Jury—Byron A. Cain and Sally Cain, et al., appellants,* v. *United States of America, appellee, No. 11861, September Term, 1956,* and held that it was the duty of the District Court to protect its processes by preventing the misuse of the evidence procured thereby. Said opinion of the Court of Appeals for the 7th Circuit is not reported and a copy thereof is made an appendix to this petition (A. 37a at 50a—55a).

It is believed that a conflict is presented by the said decisions of the Courts of Appeals for the 4th and 7th Circuits.

(3) Has decided federal questions in a way in conflict with applicable decisions of this Court.

Though the applications thereof seem not to have been thoroughly defined, there seems to be no question that District Courts have some supervision over grand juries and their procedures: See: *In re National Window Glass Workers* and *Wilson* v. *United States, supra,* and, also, *In the Matter of Savin,* 131 U. S. 267, at 277. Indeed, the opinion of the Court of Appeals for the Fourth Circuit the review of which is sought by this petition accepts the fact that the District

Court does have duties and responsibilities of making decisions on matters which arise in the course of the grand jury investigation.

There would seem to be no doubt that the District Court has jurisdiction to discharge a grand jury (Rule 6(g) Federal Rules of Criminal Procedure). The jurisdiction to discharge the grand jury comprehends the jurisdiction to continue the grand jury in session or to excuse it.

In *In Re Texas Company, 201 F. 2d 177* at 179, it was held by the United States Courts of Appeals, District of Columbia Circuit, upon a petition for writ of mandamus, that the discretion of the District Court in respect to the discharge of the grand jury could not be invaded by the Court of Appeals.

The record in the case at bar shows that, in the exercise of his judicial discretion, Judge Moore was of opinion that to recess the grand jury for the extended period of nearly four months would not be in the interest of justice (Tr. 144-145) and that when the grand jury was excused the grand jury stated that it had nothing more to investigate and that the government attorneys said that they had nothing further to present. Judge Moore excused the grand jury from further service unless recalled. The government attorneys renewed their request for the adjournmnt for nearly four months, but at no time requested that the grand jury be recalled for the purpose of hearing further evidence.

Certainly also the District Court had jurisdiction to consider and act upon the motion to quash the subpoenae duces tecum (Rule 17(c) Federal Rules of

Criminal Procedure). The case of *Hale* v. *Henkel*, 201 U. S. 43, referred to in the opinion of the Court of Appeals, also (201 U. S. 43, at 77) makes it clear that to warrant an order requiring compliance with a subpoena duces tecum to produce records before a grand jury some showing of the materiality of the records to the investigation must be shown. Indeed, in an appearance before the District Court on October 12, 1956, in relation to this very case, Mr. Victor H. Kramer, an attorney of the Antitrust Division, in respect to the matter of the quashing of the subpoena, stated, "* * * so that while the style of this proceeding in the Court of Appeals is that of mandamus, in practical effect it is really a normal adversary proceeding between counsel for the dairy company subpoenaed and counsel for the government * * *" (Tr. 248-9). *Cobbledick* v. *United States*, 309 U. S. 323, is authority that mandamus is not a procedure by which to review rulings upon motions to quash subpoenae duces tecum.

Again, Rule 6(e) of the Federal Rules of Criminal Procedure, so far as material here, provides: "(e) *Secrecy of Proceedings and Disclosure.* Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, *attorney*, interpreter or *stenographer* may disclose matters occurring before the grand jury *only when so directed by the court preliminarily to or in connection with a judicial proceeding* * * *." (Emphasis that of counsel.)

Certainly the taking of testimony is a matter occurring before the grand jury.

In each of these three matters: The excusing of the grand jury, the quashing of the subpoena duces tecum,

and the limiting of the use of the transcript of the testimony before the grand jury, the District Court, acting by its Judge, Judge Moore, had jurisdiction. In entering the orders complained of by the United States of America in its petition for mandamus, Judge Moore made decisions; he took judicial actions within his jursdiction.

The decisions of the Supreme Court of the United States are numerous that mandamus may not be used to review and reverse judicial decisions when made or to control judicial discretion while the inferior tribunal is acting.

In the case of *Ex parte In the Matter of John H. Burtis, et al*, 103 U.S. 238, 13 Otto 238, this Court, speaking through Mr. Chief Justice Waite, observed:

> "A writ of *mandamus* may be used to compel an inferior tribunal to act on a matter within its jurisdiction, but not to control its discretion while acting, * * *, or to reverse its decisions when made. * * * Both these rules are elementary and are fatal to this application. * * *."

In the case of *In re Hawkins*, 147 U. S. 486, speaking for this Court, Mr. Chief Justice Fuller said: "We cannot by mandamus review the judicial action thus had in the exercise of legitimate jurisdiction."

In the case of *In the Matter of Park & Tilford*, 245 U.S. 82, at 85, it is said:

> "It is elementary that the writ of mandamus will not issue to require the court to make a particular decision, and may only be invoked where the purpose is to require action of a court of com-

petent jurisdiction, where such court has refused to exercise the power of decision with which it is invested by law. * * *."

See also: *Ex parte American Steel Barrel Co.*, 230 U.S. 35; *In re Parsons*, 150 U.S. 149; *In re Haberman Manufacturing Co.*, 147 U.S. 524; *In re Pollitz*, 206 U.S. 323; and *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379.

The decision of the Court of Appeals for the Fourth Circuit, for the review of which this petition is presented, is an unprecedented use by a Court of Appeals of the writ of mandamus to review and to control judicial action—judicial action involving the exercise of judicial discretion—of a District Court; and it is believed that the decision of said Court of Appeals squarely conflicts with the aforesaid decisions of the Supreme Court of the United States.

EARLY HEARING REQUESTED

If the writ of certiorari prayed for herein be granted, it is requested that an early hearing be given. By the provisions of Rule 6(g), Felderal Rules of Criminal Procedure, the period of service of the grand jury making the investigation here under consideration will end in November, 1957, and this case may become moot, in whole or in part, and this Court may then dismiss the writ of certiorari for that reason. In that event, a decision of the Court of Appeals for the Fourth Circuit against United States District Court for the Southern District of West Virginia and the Honorable Ben Moore, the Judge thereof, which decision it is believed should be reversed, would stand unreviewed and unreversed.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

VALLEY BELL DAIRY CO., INC.,
a corporation,

FAIRMONT FOODS COMPANY, a corporation,

BEATRICE FOODS CO., INC., a corporation,

MOUNT VERNON FARM DAIRY PRODUCTS, INC., a corporation,

FISHER A. BONHAM, JOHN T. BONHAM, ESTA E. BONHAM, and KATHRYN B. SINES, Partners trading as BONHAM'S DAIRY,

DAIRYMEN'S COOPERATIVE SALES ASSOCIATION, a corporation and

The Honorable BEN MOORE, Judge of the United States District Court for the Southern District of West Virginia,

By

Dale G. Casto,

Homer A. Holt,

Stanley C. Morris,

John V. Ray,

John T. Keenan,

Their Attorneys.

KAY, CASTO & CHANEY,
Charleston National Bank Bldg.,
Charleston, West Virginia;

JACKSON, KELLY, HOLT & O'FARRELL,
Kanawha Valley Bldg.,
Charleston, West Virginia;

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Kanawha Valley Bldg.,
Charleston, West Virginia;

PAYNE, MINOR, RAY, PRICE & LOEB,
Kanawha Valley Bldg.,
Charleston, West Virginia; and

JOHN T. KEENAN,
Charleston National Bank Bldg.,
Charleston, West Virginia.

Of Counsel.

APPENDIX

1. Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7311.

United States of America,
Petitioner,

versus

United States District Court for the Southern District of West Virginia, and the Honorable Ben Moore, Judge of the United States District Court for the Southern District of West Virginia,
Respondents.

ON PETITION FOR A WRIT OF MANDAMUS.

(Argued October 17, 1956.

Decided November 13, 1956.)

Before PARKER, Chief Judge, and SOPER and SOBELOFF, Circuit Judges.

Victor H. Kramer, Trial Attorney, Anti-Trust Division, Department of Justice, (Victor R. Hansen, Assistant Attorney General; Charles H. Weston, Harry E. Pickering and Ernest L. Folk, III, Attorneys, De-

partment of Justice, on brief) in support of petition for writ of mandamus, and Homer A. Holt and Dale G. Casto (Kay, Casto & Chaney; Steptoe & Johnson; Stanley C. Morris; Jackson, Kelly, Holt & O'Farrell; Payne, Minor, Ray, Price & Loeb; John V. Ray, and John T. Keenan on brief) in opposition to petition for writ of mandamus.

PARKER, Chief Judge:

This is an application by the United States for a writ of mandamus directed to the Judge of the United States District Court for the Southern District of West Virginia. The application relates to action taken by the District Judge in proceedings wherein a grand jury of the District was making investigation to determine whether indictments for violation of the federal anti-trust laws should be returned against persons or corporations engaged in the milk industry in that area. It asks that the judge be directed to vacate an order quashing in part subpoenas duces tecum for the production of documents before the grand jury, an order imposing conditions upon the use by attorneys for the government of transcript of evidence heard before the grand jury and an order forbidding the grand jury to complete the investigation in which it was engaged. The District Judge has written a letter to the presiding judge of this court which has been received by the members of the court and has been ordered filed in the record as his statement in answer to allegations of the application, a complete transcript of the proceedings in the District Court has been filed, and corporations against whom the subpoenas duces tecum were directed have filed petition to be allowed to intervene and file motion for dismissal of the application. They are al-

lowed to intervene and their briefs and oral argument have been given full consideration by the court. The facts are as follows:

On April 30, 1956, a grand jury, which had theretofore been empaneled in the Southern District of West Virginia and had completed its work for the term, was called back in a special session by the District Judge at the instance of attorneys representing the United States Department of Justice to investigate the local milk industry with a view of determining whether there had been violations of the federal anti-trust laws. The judge charged the grand jury as to its duties in the premises, in the course of which he instructed it as to its relationship with the government attorneys, saying that all that the attorneys were supposed to do was "to show you what the evidence is by letting you hear it and see it and not arguing to you or recommending to you or trying to persuade you of anything."

A few days later motion was made by attorneys representing corporations which were being investigated to quash portions of subpoenas duces tecum requiring the production of certain corporate records before the grand jury. The judge granted the motion on the ground that there was no showing before him that the records so subpoenaed were material to the inquiry, but stated that if the grand jury itself, as distinguished from counsel for the government, made the request, a different question would be presented. Following this, the grand jury appeared in court and requested that subpoenas be issued for the production of the records of the corporations being investigated, including minutes of directors' meetings, annual balance sheets, profit and loss statements, records of annual sales, annual reports and documents showing deviations from

regular prices. Upon its appearing that the resolution of the grand jury requesting subpoenas for the production of these documents had been prepared by government counsel, the judge denied the request on the ground that no showing of materiality had been made, although one of the grand jurors spoke up and said that the request for the records, so far as he was concerned, was "based upon things that had been heard by the grand jury".

Some days later the District Judge notified government counsel that they might not examine other documents which had been produced pursuant to subpoena except in the presence of the grand jury and notified the stenographer taking evidence at the grand jury hearing that transcript thereof was not to be delivered to government counsel. He stated to counsel that they might not have a transcript of the testimony prior to the returning of an indictment. In this connection he said: "Before indictment I know of no reason why the attorneys should have a copy of the testimony to take away from the grand jury with them any more than they are entitled to have the documents that are brought in under subpoena." And at another place he said: "The attorneys for the Government have complete disclosure of everything that's before the grand jury for the purpose of enabling them to perform their duties, and if it is necessary to have a transcript of the evidence for the purpose of drawing an indictment the evidence can be transcribed and the indictment can be drawn in the presence of the grand jury". On May 25 the court addressed a letter to counsel with regard to the matter in which he said:

> "1. I do not agree that the stenographer's notes belong to the prosecuting, or executive arm of

the government. The Grand Jury is in the judicial branch of government, and it is highly important to the rights of the individual citizen that the distinction between the powers, duties, and rights of the two coordinate branches of government be maintained. The ultimate right to its record of proceedings resides in the Grand Jury under the supervision and guidance of the Court.

"2. I do agree with you gentlemen that it is proper for you to have from the stenographer a transcript of the evidence for the purpose of carrying out the duties which you list on page 5 of your brief, namely: '1) the conduct of a thorough investigation; 2) the preparation of the indictment; and 3) preparation for trial.'

"3. You will be permitted therefore to receive from the stenographer a transcript of the evidence taken down by him, for the purposes mentioned. This means that if indictments are returned by the Grand Jury you will be permitted to retain the transcript insofar as it relates to persons or corporations then under indictment, for use in preparing for trial and prosecuting the cases to a conclusion. However, if no indictments are found by the Grand Jury or if certain persons or corporations under investigation are not indicted, the transcript relating to such persons or corporations as are not indicted will be returned to the Clerk of the Court as custodian thereof for the Grand Jury.

"4. During the use of the transcript by counsel for the government prior to indictment, it shall be kept strictly confidential, and no copies made thereof.

"5. Your receipt of a transcript from the stenographer will constitute your acceptance of the conditions as to its use which are set out above.

> "6. My chief reason for holding that the transcript prior to indictment (or with reference to any persons or corporations not indicted) shall remain undisclosed is my belief that if the Grand Jury, after full and fair investigation, decides not to indict a particular person or corporation, it is not in the interest of justice that testimony which reflects on the character of that person or corporation be left in the hands of anyone, including representatives of the executive department of government."

On May 24, 1956, after the grand jury had been in session a number of weeks, it came into court and requested adjournment to September 10 to permit the stenographer to write up a transcript of the evidence and for government counsel to prepare a digest of the transcript, stating that it would consider further evidence if necessary. The judge denied this request and stated that government counsel would not be allowed to prepare a digest of the evidence that had been heard and read it to the grand jury. On May 29 the grand jury renewed its request for an adjournment, but the court again denied the request and told the grand jury that it had been in session long enough to determine whether or not indictments should be returned and that it should proceed to vote to return or not to return indictments, reiterating that he would not permit government attorneys to digest the evidence for the benefit of the grand jury, saying:

> "If the facts are complex, there is nothing that anyone can do about that. The government attorneys are not permitted to make a digest of these facts and tell you 'here are the essential facts and you needn't consider any others' because it is the duty of the grand jury to consider all the evidence. That's why the other day when

> you requested some time to have the government attorneys make a digest of the evidence I refused to permit that because obviously if the government attorneys made a digest of the evidence, then what they presented to you finally would not be the evidence that you gentlemen heard but it would be their opinion of what the important part of that evidence was, whereas you gentlemen as a grand jury are required by your oath to consider all the evidence and there is no way that anybody else can make a digest of it and furnish it to you."

Upon one of the grand jurors stating that it was his understanding that the grand jury believed that the evidence that had been presented warranted further investigation, the court made it clear that the grand jury should either proceed to indict or state that it did not believe anyone should be indicted. The grand jury then held another session and reported to the court that it did not wish to vote on the question of indictment at that time, whereupon the court excused it from further attendance on the court, saying:

> "You will remain the grand jury of the court until the court calls another grand jury in connection with the November term but you will not be required nor permitted to have any further sessions unless you are called in by the court, so you are now excused and you may claim attendance at the clerk's office."

On June 1 government counsel moved that the court order the grand jury to reconvene on September 15, and the court denied this motion.

On these facts, the first question which arises is, assuming that there was error or abuse of discretion on the part of the District Judge, is there power in this

court to grant relief by writ of mandamus? Counsel for the intervening corporations which were being investigated by the grand jury deny that we have such power; but to this we cannot agree. The "all writs" statute, 26 USC 1951(a), vests in courts of appeals power to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." As we pointed out in *American Chain & Cable Co.* v. *Federal Trade Commission*, 4 Cir. 142 F. 2d 909, 912, a court given power to review may by mandamus compel the court over which it is given such power to so exercise its jurisdiction that the power of review may not be defeated. The authority of the appellate court "is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected. Otherwise the appellate jurisdiction could be defeated and the purpose of the statute authorizing the writ thwarted by unauthorized action of the District Court obstructing the appeal." *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 25. And the writ may be issued to prevent a District Judge from thwarting the commencement of an action over which the appeals court would have appellate jurisdiction, and so it was granted to compel a District Judge to vacate an order denying an application for a bench warrant after an indictment had been returned. *Ex Parte United States*, 287 U.S. 241, 246. In the case last cited, the Supreme Court, speaking through Mr. Justice Sutherland, said:

> "*McClellan* v. *Carland*, 217 U.S. 268, 280, laid down the general rule applicable both to this court and to the circuit courts of appeals, that the power to issue the writ under R. S. 716 is not

> limited to cases where its issue is required in aid of a jurisdiction already obtained, but that 'where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below'."

We see no reason why these principles should not be applied to the potential litigation involved in a grand jury investigation. Such litigation, if commenced, lies within the appellate jurisdiction of this court; and if that jurisdiction is being thwarted by erroneous exercise of power or abuse of discretion by the District Judge, there is no more reason why this court should not exercise its power than in the case where the judge is refusing to issue a bench warrant. It is argued that a grand jury might not find indictments, in which event there would be nothing with respect to which appellate jurisdiction could be exercised; but, of course, there would have been nothing with respect to which appellate jurisdiction could have been exercised if the trial of the person arrested under the bench warrant had resulted in an acquittal.

Supervisory jurisdiction over litigation in the trial courts is visited in the courts of appeals by the "all writs" statute quoted above. Supervisory jurisdiction over the administration of justice in the trial courts is vested by 28 USC 332 in the judicial councils of the circuits composed of the circuit judges who are given power to make all necessary orders "for the effective and expeditious administration of the business of the courts within the circuit". If the matters called to our attention are not matters affecting litigation in the district court with respect to which we have jurisdiction under the "all writs" statute, they are certainly matters

affecting the effective and expeditious administration of the business of the courts and, as such, are subject to our orders as the council of the circuit. It is inconceivable that power should not be vested somewhere to deal with such a situation. It is not necessary, however, to consider our power as the council of the circuit. We think that as grand jury investigations relate to matters potentially within our appellate jurisdiction, we have jurisdiction under the "all writs" statute to issue writs of mandamus to correct errors or abuses of discretion on the part of the district judge in dealing with such investigations.*

Coming then to the merits of the case, we think that the United States is upon the undisputed facts unquestionably entitled to the writ. We do not for a moment question the good faith of the learned and able district judge or think that he was actuated by any motives other than a desire to see that justice was properly administered. We think, however, that the action taken by him interfered unduly with the powers of the grand jury and the proper functions of government counsel in the investigation which the grand jury was conducting. In this connection it must be remembered that, while a grand jury is not independent of the court, it is not subject to the court's directions and orders with respect to the exercise of its essential functions. See *Hale* v. *Henkel*, 201 U.S. 43, 65; *Blair* v. *United States*, 250 U.S. 273, 282. As said in the case last cited:

> "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose

*See *In re Texas Company* D.C. Cir. 201 F. 2d 177, wherein the Court of Appeals of the District of Columbia Circuit denied an application for writ of mandamus to compel the district court to discharge a grand jury without questioning its power to issue the writ in a proper case.

> inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning."

As to the quashing of the subpoenas and the refusal of the court to allow these to be used to bring before the grand jury the records requested because the materiality of such testimony was not shown to the judge, we think that this was clearly erroneous. In investigations of this character, examination of records such as the grand jury sought to examine here may throw much light on whether or not there has been a violation of law by the parties being investigated; and if the right of the grand jury to examine such records is to be denied because it is unable to point out the materiality of the records sought, it will be greatly hampered in the performance of its duties. When a kindred question, i. e. whether the grand jury could require the production of corporate records for its examination in the absence of a specific charge pending before the grand jury (and materiality of records could be judged only with reference to a charge of crime against someone), the Supreme Court in *Hale* v. *Henkel*, *supra*, not only answered the question in the affirmative, but held also that the fact that such corporate records might tend to incriminate the officer producing them was no reason for not requiring their production. In that case the court said:

> "We deem it entirely clear that under the practice in this country, at least, the examination of

witnesses need not be preceded by a presentment or indictment formally drawn up, but that the grand jury may proceed, either upon their own knowledge or upon the examination of witnesses, to inquire for themselves whether a crime cognizable by the court has been committed; that the result of their investigations may be subsequently embodied in an indictment, and that in summoning witnesses it is quite sufficient to apprise them of the names of the parties with respect to whom they will be called to testify, without indicating the nature of the charge against them. So valuable is this inquisitorial power of the grand jury that, in States where felonies may be prosecuted by information as well as indictment, the power is ordinarily reserved to courts of impanelling grand juries for the investigation of riots, frauds and nuisances, and other cases where it is impracticable to ascertain in advance the names of the persons implicated. It is impossible to conceive that in such cases the examination of witnesses must be stopped until a basis is laid by an indictment formally preferred, when the very object of the examination is to ascertain who shall be indicted."

As pointed out elsewhere in *Hale* v. *Henkel, supra*, the production of corporate records under a subpoena duces tecum should be held within reasonable limits and materiality may be considered as bearing upon that question; and rule 17(c) of the Rules of Criminal Procedure provides that the court may quash or modify a subpoena requiring the production of books, papers or documents "if compliance would be unreasonable or oppressive". There is nothing here to indicate that compliance with the subpoena to produce the records which the grand jury desires to examine would have been either unreasonable or oppressive and the action

of the judge was based, not on that ground, but on the ground that their materiality was not shown. We think that this was error. We know of no law requiring that evidence be material before a grand jury have the right to consider it. So far as the intervenors who objected to the production of the records is concerned, they cannot raise the question of materiality. *Nelson* v. *United States*, 201 U.S. 92, 115; *Blair* v. *United States*, 250 U.S. 273, 282. As said in the case last cited: "He is not entitled to urge objections of incompetency or irrelevancy, such as a party might raise, for this is no concern of his". So far as we can judge from the record before us, the records which the grand jury asked to be produced for examination are precisely the sort of records that are ordinarily examined in investigations to determine whether prosecutions under anti-trust laws are to be instituted.

We think, also, that it was an unwarranted interference with the proper functioning of the grand jury and of government counsel who were assisting them in the investigation for the court to forbid counsel to have a transcript of the testimony or to digest it for the benefit of the grand jury or to examine documents except in the presence of the grand jury. We agree, of course, that government counsel should not be allowed to dictate to the grand jury; but no such attempt to dictate to the grand jury is suggested, and the judge in his charge had sufficiently warned against such dictation. In investigations of this sort, it is necessary that the grand jury have the aid of counsel, not only in examining witnesses but also in digesting the great mass of evidentiary matter produced before them, which would mean little or nothing to them unless digested and analyzed in the light of applicable legal principles. It is possible that counsel may abuse their

relationship by seeking to influence the grand jury's action; but counsel themselves must sign any indictments which are returned, and the opprobrium which would arise from securing and joining in an unwarranted indictment is ordinarily a sufficient restraint upon excessive enthusiasm on the part of prosecutors. No intelligent lawyer wishes to be placed in the situation of fathering a prosecution which cannot be sustained; and it must not be forgotten that the grand jury is engaged, not in trying the persons whom it investigates but in deciding whether they should be placed on trial. If grand jurors may base an indictment on hearsay, as held in *Costello* v. *United States*, 350 U.S. 359, we see no reason why they may not consider a digest of testimony which they have heard; and the fact that such digest has been prepared at their request by counsel charged with responsibility for the prosecution furnishes no reason why they may not consider it.

We see no objection, furthermore, to counsel for the government being allowed to have a transcript of the testimony to be used by them in conference with their superiors in the Department of Justice. There is nothing in the reason of the rule requiring secrecy of grand jury proceedings* which precludes counsel assisting in the investigation from having a transcript of the testimony which they have produced before the grand jury or consulting with their superiors in regard thereto. If they make an improper disclosure of what has occurred before the grand jury or make other improper use of the evidence there taken, they are subject to attachment for contempt; but this is no reason why the court should hamper them in the proper discharge of their

*See *United States* v. *Smyth* 104 F. Supp. 283; *United States* v. *Amazon Industrial Chemical Corp.* 55 F. 2d 254.

duties by denying them free use of the evidence and the documents which have been produced before the grand jury.

Likewise, we see no objection to counsel for the government being allowed to summarize for the benefit of the grand jury the evidence that has been heard. This matter was dealt with by Judge Augustus N. Hand in *United States* v. *Rintelen*, 235 F. 787, 791-792, where he said:

> "If in a complicated case he were not allowed to show the grand jurors the bearing of the evidence upon the alleged violation of the statute, they would certainly be confused as to the entire situation. Even a trained judge is often unable to understand the bearing of relevant testimony without the aid of counsel. Asking the grand jury to find an indictment is but putting in words what every act of the government, and its representatives, means and is well known to mean. What reasonable objection can be urged against allowing the man who has prepared the case to refresh the recollection of the grand jurors by summarizing the evidence taken, perhaps, over weeks or months, and reading from the minutes and giving them a list of the names of the persons charged with the crime? Any objection is really, if not ostensibly, based on the supposition that grand juries are devoid of all independence and prosecuting officers are either tyranical or dishonest."

With respect to the instruction given the grand jury that it must vote either to indict or not to indict and might not take an adjournment for the summarization of the testimony taken, this we think was a clear invasion of the grand jury's powers and one which cannot

be justified by the power to discharge the grand jury, as provided by Rule 6(g) of the Rules of Criminal Procedure. To discharge the grand jury is one thing. To tell them that they must indict or say that they cannot indict and that they cannot take an adjournment for the summarization of the vast mass of testimony taken over several weeks of time, is another and very different thing. In reversing a ruling that a case which had been ignored by one grand jury could not be presented to a subsequent grand jury without permission of the court, the Supreme Court in *United States* v. *Thompson*, 251 U.S. 407, 413, approved the following propositions with respect to the power of grand juries and United States Attorneys:

> "(1) That the power and duty of the grand jury to investigate is original and complete, susceptible of being exercised upon its own motion and upon such knowledge as it may derive from any source which it may deem proper, and is not therefore dependent for its exertion upon the approval or disapproval of the court; that this power is continuous and is therefore not exhausted or limited by adverse action taken by a grand jury or by its failure to act, and hence may thereafter be exerted as to the same instances by the same or a subsequent grand jury.
> "(2) That the United States district attorney, in virtue of his official duty and to the extent that criminal charges are susceptible of being preferred by information, has the power to present such informations without the previous approval of the court; and that by the same token the duty of the district attorney to direct the attention of a grand jury to crimes which he thinks have been committed is coterminous with the authority of the grand jury to entertain such charges."

While the grand jury is summoned, empaneled and sworn by the court, it is essentially independent of court control. As said by Judge Fee in *United States* v. *Smyth*, 104 F. Supp. 283, 292: "While the court may exercise an influence over the proceedings, there is neither a method whereby an indictment by a grand jury can be peremptorily required, nor, on the other hand, is there any method of preventing the presentment of an indictment except by summary discharge". See also the opinion of Judge Learned Hand in *In re Kittle*, 180 F. 946, the opinion of Judge Lindley in *Application of Texas Co.*, 27 F. Supp. 847, 850, and the opinion of Judge Wyzanski in *Application of Jaconi*, 120 F. Supp. 589, 591. The grand jury acts as an independent body. While the judge has the supervisory duty to see that its process is not abused or used for purposes of oppression or injustice *(In re National Window Glass Workers*, 287 F. 219, 225), there should be no curtailment of its inquisitorial power except in the clearest cases of abuse. *In re Grand Jury Proceedings*, 4 F. Supp. 283; *Application of Jaconi, supra.* Speaking of the right of a grand jury to continue an investigation once begun. Mr. Justice Frankfurter, in *United States* v. *Johnson*, 319 U.S. 503, 512, warned that the grand jury is not to be made "a pawn in a technical game instead of respecting it as a great historic instrument of lay inquiry into criminal wrongdoing."

In the recent case of *Costello* v. *United States*, 350 U.S. 359, 362, the Supreme Court in sustaining an indictment attacked on the ground that it had been found on hearsay evidence, took occasion to speak of the independence of the grand jury, saying:

> "The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the

> Founders. There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor. The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. Grand jurors were selected from the body of the people and their work was not hampered by rigid procedural or evidential rules. In fact, grand jurors could act on their own knowledge and were free to make their presentments or indictments on such information as they deemed satisfactory. Despite its broad power to institute criminal proceedings the grand jury grew in popular favor with the years. It acquired an independence in England free from control by the Crown or judges."

In *Cobbledick* v. *United States*, 309 U.S. 323, 327, the Supreme Court used language that is peculiarly appropriate here, viz.:

> "The Constitution itself makes the grand jury a part of the judicial process. It must initiate prosecution for the most important federal crimes. It does so under general instructions from the court to which it is attached and to which, from time to time, it reports its findings. The proceeding before a grand jury constitutes 'a judicial inquiry,' *Hale* v. *Henkel*, 201 U.S. 43, 66, of the most ancient lineage. See *Wilson* v. *United States*, 221 U.S. 361. The duration of its life, frequently short, is limited by statute. It is no less important to safeguard against undue interruption the inquiry instituted by a grand jury than to protect from delay the progress of the trial after an indictment has been found. *Opportunity for obstructing the 'orderly progress' of investigation should no more be encouraged in one case than in the other.* That a grand

> jury proceeding has no defined litigants and that none may emerge from it, is irrelevant to the issue." (Italics supplied.)

In the light of these authorities, we think there can be no question but that, if a grand jury wishes to investigate corporate records, it may do so, subject only to the limitation that the process of the court may not be used to compel their production, if this would be unreasonable or oppressive. If it desires to have the evidence analyzed and summarized by government counsel assisting in the investigation, this may be done. If it wishes to take an adjournment for evidence to be summarized and then come back and give further consideration to the case, it has also the right to do this.

For the reasons stated, we think that the government is entitled to the writ which it asks directing the District Judge to reconvene the grand jury to the end that it continue the investigations which it has begun, and to vacate the orders quashing the subpoenaes for documents and records and limiting the right of government counsel to receive and use transcript of the evidence heard before the grand jury. It is clear, however, that the learned judge has taken the action complained of merely because of an erroneous view of the law applicable; and we assume that it will not be necessary that the writ of mandamus actually issue requiring him to act, now that this court has passed upon the questions involved. Order will accordingly be entered that the United States is entitled to the writ, but the writ will not actually issue unless further order be entered to that effect.

Petition Granted.

2. Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7311.

United States of America,
Petitioner,

vs.

United States District Court for the Southern District of West Virginia, and the Honorable Ben Moore, Judge of the United States District Court for the Southern District of West Virginia,
Respondents.

ON PETITION FOR A WRIT OF MANDAMUS.

This cause came on to be heard on the petition of the United States of America for a writ of mandamus; brief in support thereof; answer of the Honorable Ben Moore; petition of Valley Bell Dairy Co., Inc., a corporation, Fairmont Foods Co., Inc., a corporation, Beatrice Foods Co., Inc., a corporation, Mount Vernon Farm Dairy Products, Inc., a corporation, Bonham's Dairy, a partnership, and Dairymen's Cooperative Sales Association, a corporation, to intervene; motion of said parties to dismiss the petition; brief in support thereof; the transcript of the proceedings in the District Court; and the said cause was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the petition of the aforesaid parties to intervene be, and it is hereby, granted; and that the petition of the United States of America for a writ of mandamus be, and it is hereby, granted in accordance with the opinion of the Court filed herein, but the formal writ of mandamus will not actually issue unless further order be entered to that effect.

The clerk is directed to transmit certified copies of this order to the Honorable Ben Moore and the clerk of the United States District Court for the Southern District of West Virginia.
November 13, 1956.

JOHN J. PARKER,

Chief Judge, Fourth Circuit.

A true copy,
Teste:

(s) RICHARD M. F. WILLIAMS, JR., *Clerk,*

U. S. Court of Appeals for the
Fourth Circuit.

3. Order of Court of Appeals Granting Stay

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7311.

United States of America,
Petitioner,

vs.

United States District Court for the Southern District of West Virginia, and the Honorable Ben Moore, Judge of the United States District Court for the Southern District of West Virginia,
Respondents.

ON PETITION FOR A WRIT OF MANDAMUS.

Upon consideration of the motion of Valley Bell Dairy Co., Inc., a corporation, Fairmont Foods Co., Inc., a corporation, Beatrice Foods Co., Inc., a corporation, Mount Vernon Farm Dairy Products, Inc., a corporation, Bonham's Dairy, a partnership, and Dairymen's Cooperative Sales Association, a corporation, Intervenors, for a stay of proceedings pending application in the Supreme Court of the United States for a writ of certiorari to this Court in the above entitled matter, and the argument of counsel thereon:

It is ordered by this Court that further proceedings in the above entitled matter be, and they are hereby, stayed pending application of said Intervenors in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, provided the application for a writ of certiorari is filed in the said Supreme Court within fifteen days from this date.
November 26, 1956.

JOHN J. PARKER,
Chief Judge, Fourth Circuit.

A true copy,
Teste:

RICHARD M. F. WILLIAMS, JR., *Clerk,*
U. S. Court of Appeals for the Fourth Circuit.
By (s) MARGARET L. DAVIS,
Deputy Clerk.

(Imprint of Seal)

4. Letter of Judge Moore to Judge Parker

October 5, 1956

Honorable John J. Parker,
Chief Judge,
United States Court of Appeals
for the Fourth Circuit,
Richmond, Virginia

Dear Judge Parker:

On Saturday, September 30, 1956, I received through the mail from the Department of Justice in Washington a printed petition for a writ of mandamus and brief in support thereof, directed against the court over which I preside and against me as judge thereof. This printed document was accompanied by a letter from Victor R. Hansen, Assistant Attorney General, dated September 27, 1956, stating that it was his understanding from Mr. Williams that the petition would be docketed on the following day. Since then I have received from the clerk a copy of the order docketing the petition and setting it for hearing on October 17, 1956.

The petition grows out of incidents in connection with a specially convened grand jury which was called by me at the request of Harry E. Pickering, Attorney in the Anti-Trust Division of the Department of Justice, and which sat for nearly four weeks last spring to investigate alleged violations of the anti-trust laws.

I believe it is not proper for me to appear in this litigation in an adversary capacity. The writ sought, if granted, would require me as Judge to vacate certain orders described in the petition. The granting or refusing of the writ is of no more concern to me than

would be the reversal or affirmance of any other judicial act of mine which might be brought before the Court of Appeals on appeal. I have no disposition to try to sustain these orders by argument or citation of authority. Whatever conclusion the Court of Appeals may reach with reference to the granting of the writ of mandamus, upon a careful reading of the entire transcript of the proceedings, will be perfectly satisfactory to me.

I shall therefore make no formal appearance in opposition to the granting of the writ, but will confine my participation to the writing of this letter. I am enclosing two copies, one for each of the other judges who may sit in the matter; and I am also mailing a copy to Mr. Hanson, and to Mr. Casto, the local attorney who represented Valley Bell Dairy Company in the hearing before me relative to the subpoena duces tecum, the decision as to which is sought to be affected by the writ.

I think it important that the Court of Appeals be advised somewhat more accurately than the government attorneys have seen fit to do in their petition and brief of the circumstances which moved me to enter the orders complained of. These are all set out in the transcript a copy of which, government attorneys say in a footnote on page 2 of their petition, they are lodging with the Clerk of the Court of Appeals. It is very important to an understanding of the entire matter that the complete transcript be read, and not merely those excerpts which are printed in the government's appendix to its brief.

It seems to be the purpose of government attorneys by the petition and brief to convey the impression that in the various actions which I took during the course of

the grand jury's special service I was attempting to hinder, impede, or prevent the investigation in which the grand jury was engaged. A careful reading of the entire transcript will clearly show that there is no foundation for that thought. On the contrary, it will appear that my whole purpose was to assure that the government's investigation should be conducted as fairly as possible both to the government and to the persons under investigation; and particularly that the functions of the grand jury as a judicial and investigating body and the functions of the government attorneys as part of the executive branch of government be kept separate and distinct throughout.

As stated on page 9 of the government's brief, attorneys from the Department of Justice (specifically Mr. H. E. Pickering) did arrange with me to call a special session of the grand jury to investigate the local milk industry for alleged violations of the federal anti-trust laws. It would not be proper, I think, to state what was said by me to the government attorney in private conference; but the gist of the private conference was carried into my charge to the grand jury. I am not certain that this charge is included in the copy of the transcript which government counsel have lodged with the clerk of the Court of Appeals, although there are two short excerpts from the charge quoted on page 29 of the government's brief and appendix. Therefore, I will quote here a part of what was said by me to the grand jury at the outset, *in the presence of the government attorneys.*

> "Misdemeanors can be prosecuted without the intervention of a grand jury and these violations which are covered by the anti-trust laws, being misdemeanors, could be prosecuted by information if the government wishes to take that step.

However, they may also be prosecuted by indictment if the government wishes to proceed in that way.

"In this case the government has decided that a grand jury should inquire into these matters which attorneys for the government feel are the proper subject for your inquiry. That decision is obviously made for this reason; in proceeding by information it would be necessary, of course, that the government set out in the information all the facts that it alleges are in existence to constitute the violation of the law.

"In learning what the facts are the attorneys for the government, being a part of the executive branch of the government—that is, the law enforcing branch—are not vested with the power of subpoena. They can't ask the court to issue a subpoena to a witness to come in before them as attorneys for the government and give them information that they are looking for; and so I take it from their desire to call the grand jury together that they actually are unable at this time to set forth in an information all the necessary facts which would show a violation of these anti-trust laws.

"The grand jury, however, does have the power to require witnesses to come before it, and the government attorneys have the power also by merely requesting the clerk of this court to have subpoenas issued for witnesses to come before the grand jury. Bear in mind they have no power to have witnesses come before them. They are part of the executive branch of government. The grand jury is a part of the judicial branch of government, and whatever you do you are doing not as law enforcers at all. That isn't a part of your business. The business of the judicial department is to pass on evidence and decide whether evidence is enough to constitute the necessary degree of proof, and if it is, then act on it;

but you have none of the attributes of a law enforcement body. That belongs to the executive department. That is why you are given the power of subpoena, whereas the executive department is not given the power of subpoena.

"As I have already said to the grand jury and will say now, again for the benefit of the new members of the grand jury, there are two very important functions that you serve as an institution in our governmental system. First, it is necessary that you inquire as fully as you believe you should into any matters that are brought to your attention which constitute alleged violations of federal statutes. If you didn't do that no person could ever be prosecuted at all for a felony, and in the cases where inquiries are started before you with reference to misdemeanors if you fail to make adequate inquiry the probability is that the government could not, lacking the power of subpoena, ever find out all the information that it is necessary for it to find out in order to base the charge that it believes it should bring against certain people.

"Let me go just a little further than that. When you are sitting as a grand jury you need to have your attention directed to the matters that the government as the prosecuting agent believes you should inquire into, and so it is provided very properly that attorneys for the government may be present when you are examining witnesses and at any other time when you are in session except that no attorney for the government and nobody else except a grand juror is permitted to be present when you are deliberating on whether or not you shall find an indictment and when you are taking a vote as to whether or not there shall be an indictment. You are then in executive session and no one is permitted to be present.

"The purpose of the presence of government attorneys, and the sole purpose, is that these at-

torneys may present to you whatever evidence they may believe is pertinent. Now, they present it to you not in the form of arguments. No attorney is permitted in a grand jury room to make any argument. His sole function there is to produce witnesses and documents, if the documents form a part of the evidence that he wants you to consider, and to examine these witnesses and to let you hear the statements that the witnesses make and then to let you see, if you want to see, whatever documents are brought in, and when that has been done the function of the attorneys has been fully exercised except in one particular. If the grand jury are uncertain as to the provisions of the statute and as to the interpretation of the statute they may ask government attorneys, and government attorneys are permitted to read the statute and explain what it means if the grand jurors are in doubt about it.

"I think that there will be no occasion for you to be in doubt because I expect before I am through this charge to go over the statutes and explain to you myself what they mean, and then if you wish to have further explanation from the court at any time you may get that explanation.

"*Bear in mind that in their appearance before you the government attorneys are not your agents. They are not working for the grand jury in the sense that you have employed these government agents and therefore you are going to take whatever they present, and above all you are not working for them. You are the grand jury of this court and it is you that are making the investigation. You have been called back here to make an investigation into matters which these government attorneys are going to call to your attention, but it is you that are making the investigation. You can't avoid any of your responsibility by saying the attorneys for the government did so and so, because all they are supposed to do*

is to show you what the evidence is, by letting you hear it and see it and not arguing to you or recommending to you or trying to persuade you of anything."

I have underlined the concluding paragraph of the foregoing excerpt from the charge to the grand jury because it is the basis on which all my later rulings were made, and because I believe that it is also the real basis of the government's complaint, although counsel for the government at the time indicated no disagreement with what was said to the grand jury.

It was obviously the idea of counsel for the government that, lacking subpoena power in the Department of Justice to bring documents before them (which power Congress has never seen fit to grant, although the Department of Justice has attempted for some time to secure legislation conferring that power), the grand jury could be convened and used for that purpose; although, as indicated in my charge to the grand jury I had clearly told these attorneys that it was my conception of a grand jury's functions that it could never be used as a substitute for an executive investigation; but that whatever the grand jury did must be its own act, and must not be done under the domination of any representative of the executive branch of the government.

This idea of counsel for the government that the grand jury was merely a tool to be used by them in making their own investigation first became apparent when I sustained a motion of counsel for one of the dairies under investigation to quash parts of a subpoena duces tecum procured by government attorneys, calling for the production of certain documents. My ruling was based on the fact that counsel for the gov-

ernment declined to state in what way they believed these documents to be material. I remarked: "Let them" (the grand jury) "ask for them and they will probably get them." (Gov. App. p. 36). Forthwith, government attorneys prepared a request, purporting to come from the grand jury, asking for these identical documents. These attorneys did not give the grand jury any reasons why the documents were asked for, and it was apparent to me from questions answered by the foreman of the grand jury that the grand jury itself had no reason for believing that the documents were material. (Gov. App. pp. 40-42). This conclusion was confirmed in the later hearing on May 18 (Gov. App. pp. 55 to 60), the transcript of which should be read, including those parts omitted in the government's appendix, in order to a clear understanding of the principles involved.

It was then brought to my attention that the grand jury had voted to recess for two weeks "after the attorneys explained they had this mass of evidence to go over, and it would take several weeks to do so." (Gov. App. pp. 43-44). I again told attorneys for the government that they could not, by causing the grand jury to take a recess, obtain possession for their own use, apart from the grand jury, of documents which had been brought in by subpoena duces tecum; and again made plain to them my conception of the different functions of the grand jury and government attorneys, as will appear on pages 47 and 49 of the government's appendix. Nevertheless, the grand jury proceeded to take the two week's recess, but after I had required Mr. Pickering to turn over to the clerk a key which he had to the files where the documents were kept, the grand jury reassembled within three or four days and proceeded with its investigation.

On May 24, 1956, the grand jury reported that it had decided to recess for approximately four months. Whether or not this request was made at the instance of government attorneys does not appear, but the foreman did say that the grand jury did not intend on reconvening to go over all the evidence and consider it, but did intend that government attorneys prepare a digest of a transcript of the evidence heard by the grand jury, and submit that digest to the grand jury after the expiration of four months. I told the grand jury in effect (1) that it could not possibly deal fairly with persons under investigation by allowing four months to elapse after hearing the evidence, and then considering only such parts of the evidence as might be submitted through a digest made by counsel for the government; (2) that the grand jury, while it might conceivably engage assistance in having digests of voluminous evidence made by its own agents, could not as a judicial body employ counsel for the government as agents of the grand jury in making any such digests; and (3) that persons under investigation were entitled to have the grand jury consider all the evidence which the grand jury heard, both favorable and unfavorable, and not merely selected parts of that evidence. My remarks on this were not in the exact words that I have given, but the transcript will show that this was their purport.

I said to the grand jury that they were at liberty to continue their investigations for so long as they chose while I was in the district, which period of time covered another ten days, at least. (It had originally been represented to me by Mr. Pickering that the full grand jury investigation would occupy no more than two weeks' time).

Finally, on May 29, 1956, the grand jury reported that "it has nothing further to investigate at this time" and Mr. Pickering said, "We have nothing further to call to the grand jury's attention." (Gov. App. p. 63). On the basis of these statements, I instructed the grand jury that before it was discharged it ought to take action either to vote indictments on the basis of evidence which it had heard or to vote that there should be no indictments. My reasons for making these suggestions were set out fully in the excerpts from the transcript appearing on pages 64 to 70 of the government's transcript. It was further explained that the government would be given ample time to prepare formal indictments if the grand jury should decide that indictments should be voted in certain cases. The grand jury, as shown on page 72 of the government's appendix, decided that it would not vote on the question of indictments. They were thereupon excused by me from further service unless called back.

The above is an accurate account of my acts in connection with the special grand jury, as briefly as I can state them, and without actually quoting voluminous excerpts from the proceedings not included in the government's brief, much of which, if referred to, will be found illuminating with respect to the matters presented.

Counsel for the government were much disturbed by my ruling with reference to the status of the stenographer's transcript of evidence taken before the grand jury. It will be seen (Gov. app. p. 82) that I was willing to permit government counsel free use of such a transcript, if indictments should be voted, for use in preparing for trial and prosecuting the cases to a conclusion. I later expanded this permission to include

use of the transcript in the preparation of civil suits for injunction. I now entertain some doubt as to whether the permission should have been extended so far. I say this because, after these proceedings with reference to the special grand jury had been concluded, I happened to read an official speech of the Attorney General himself (the date and occasion of which I failed to note in my file, but a tear sheet of which I preserved) in which he said that it is the practice of the Department of Justice to initiate grand jury investigations for the purpose of obtaining documents by subpoena duces tecum, to be used only in civil proceedings. The Attorney General had mentioned that the Department of Justice ought to have supoena powers in antitrust investigations. He proceeded to say:

> "A bill embodying this proposal was introduced in the closing days of the last session.
>
> "The need for its prompt enactment seems clear. Under present law, the Department has no such power. Where criminal proceedings are contemplated, of course, grand jury process adequately enables production of both documentary and oral evidence. Where the Department proceeds with an eye to civil proceedings, however, experience shows that the Antitrust Division is severely handicapped. Some potential defendants may voluntarily grant access to their records. *In other instances, however, a grand jury investigation must be initiated, and the court's power of subpoena used in order to obtain documents even though only civil proceedings may be the likely outcome.*"

I think it very possible that the grand jury investigation here may have been motivated on the part of the Department of Justice by the considerations which

the Attorney General set forth in his speech. It is my conviction that to initiate a grand jury investigation for the purpose of procuring evidence to be used in a civil case is a subversion of the judicial process, a misuse of the machinery provided by our legal system for dealing with crimes, and an intrusion by the executive department into the field of the judicial department of government.

Insofar as the quashing of parts of the subpoena duces tecum is concerned, I believe that this is a matter of importance to the corporation whose records were subpoened, which should be given the opportunity to defend the action of this court in that respect if such can be properly sustained.

As to the transcript of evidence received by the grand jury, I believe that on principle the government does not have title to the transcript as its own property, but that its use should be limited as I have limited it. I recognize that there is no clear judicial authority one way or the other on this point, and my treatment of it was based solely on considerations of fairness to persons under investigation, and the importance of the constitutional principle of keeping the powers of the judicial and the executive departments of government entirely separate.

As to the propriety of my declining to permit the grand jury to recess for four months, and upon reconvening to consider only such parts of the evidence already heard as government attorneys may see fit to read to it from a transcript, which they, and not the grand jury, have read and analyzed, I am firmly convinced that such a course of judicial action not only would violate the principle, vital to individual liberty,

of the separation of the powers of government, but could hardly fail to produce a miscarriage of justice. I am therefore not willing to permit this unless ordered to do so by the Court of Appeals, after a full consideration by that Court of the entire record of the proceedings.

Naturally, if the Court of Appeals is of a different opinion, I shall defer to that opinion without hesitation.

With highest regards, I am

Yours sincerely,

(s) Ben Moore
United States District Judge

5. Opinion of Court of Appeals for the Seventh Circuit

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 11861 SEPTEMBER TERM, 1956,

SEPTEMBER SESSION, 1956

IN THE MATTER OF THE APRIL 1956 TERM GRAND JURY

BYRON A. CAIN and SALLY CAIN, ET AL.,
Appellants,
v.
UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

November 13, 1956.

Before LINDLEY, SWAIM and SCHNACKENBERG, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* On July 27, 1956, Byron A. Cain and Sally Cain, John H. Cain as Trustee of Cain Trust No. 1, a partnership, Harold E. Sullivan, Frank J. Huebner, Uptown Federal Saving & Loan Association of Chicago, Homan Mfg. Co., Inc., a corporation, and Cain & Culhane, Inc., a corporation filed notice of appeal to this court from an order entered by the

district court on July 18, 1956, dismissing their verified petition. The court's action was taken upon a motion of the United States of America, which filed no answer to the petition.

Allegations of pertinent facts set forth in said petition which, for the purpose of this proceeding, are accepted as true, are as briefly as possible now set forth.

In 1948 the treasury department began an investigation of Shotwell Manufacturing Company, a corporation (sometimes herein referred to as Shotwell)[1] and Byron A. Cain, Frank J. Huebner and Harold E. Sullivan, its officers. That investigation was being continued when the petition herein was filed. Shotwell furnished to treasury agents its records and suitable accommodations for the agents at its offices, and expended about $20,000 in making the services of its auditors available to said agents to assist the treasury's investigation, which extended also into the personal affairs of said Cain, Sullivan and Huebner.

Shotwell, Cain, Sullivan and Huebner were indicted on two counts on March 14, 1952, for allegedly wilfully and knowingly attempting to defeat and evade a large part of the income taxes due and owing by Shotwell to the United States of America for the calendar years 1945 and 1946, in violation of 26 U.S.C.A. §145(b), in that defendants filed and caused to be filed false and fraudulent tax returns for said corporation. In a trial before a jury, defendants were convicted. On July 15, 1955, we reversed the judgment of conviction and re-

[1]Now known as Homan Mfg. Co., Inc., a corporation, and hereinafter referred to as Homan or Shotwell.

manded the case (*United States* v. *Shotwell Manufacturing Company, et al.*, 225 F.2d 394), with instructions to sustain a seasonably made motion by the defendants to suppress certain evidence, and to re-try the case.[2]

At the beginning of the year 1954 (after the trial of the criminal case), the treasury department commenced a new and complete audit and investigation of Shotwell's affairs and those of its officers for 1947 and subsequent years. Shotwell furnished space where its records were made available to the treasury agents.

On or about June 9, 1954, the then district director of internal revenue issued a departmental subpoena to Homan "In the Matter of the Tax Liability of Homan Mfg. Co. for the years 1944, 1945 and 1946", calling for all books, documents, work papers, etc., prepared and used at any date by: first, Frank DelMonte, former cost accountant of Shotwell; second, Busby and Oury, certified public accountants working for Shotwell; and third, all persons and organizations, for Shotwell, in connection with sales by said company in said years.

About July 1, 1954, Shotwell (Homan) delivered to treasury agents books and records covering transactions during the 1940's for examination, constituting a van load of papers, all of which were minutely examined by revenue agents, who made copies of those which they considered relevant, and which documents were returned to Shotwell in late 1955.[3]

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[2]Petition to the United States Supreme Court for *certiorari* is now pending.

[3]However, the documents thus delivered by Shotwell did not include special compilations made out of the regular course of business by Frank DelMonte and Busby and Oury, as demanded by the June 9, 1954 subpoenas.

Sundry records of Shotwell for the years 1947 to 1952 were called for by a subpoena issued by the acting district director about October 6, 1954. However, said records were not delivered by Shotwell because, among other reasons, Shotwell and its officers were advised and informed that said documents had been examined repeatedly by agents of the treasury and could no longer be called for re-examination under the internal revenue code,[4] constituted preparatory analyses of possible evidence to be adduced at the criminal trial and otherwise could not lawfully and constitutionally be subpoenaed.

In September and October 1955, other departmental subpoenas were served upon Homan and Byron A. Cain and Sally T. Cain, Cain Trust No. 1, and Cain & Culhane, Inc., calling for production of substantially all of their books, records and documents for the years 1947 to 1952 inclusive, relating to all of their transactions with or concerning the petitioners, or most of them.[5]

On September 15, 1955, the treasury department made a jeopardy assessment and levy against Homan

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[4]In their brief herein, petitioners cite 26 U.S.C.A. §7605(b).

[5]For example, Cain & Culhane, Inc. was directed to produce:
"All accounting books and records including general ledgers, journals, cash books, auxiliary registers and ledgers, together with canceled checks, vouchers, correspondence, invoices and other written data supporting the original entries in said accounting books relating to any and all transactions had with Byron A. Cain, Sally T. Cain, John H. Cain, James B. Cain, Mary A. Cain or Patricia A. Cain either directly or indirectly, including, but not limited to all books of account relative to reimbursement by Cain & Culhane, Inc. to Byron A. Cain for expenses of any nature, including payments made to Byron A. Cain, Sally T. Cain, John H. Cain, James P. Cain, Mary A. Cain or Patricia A. Cain and payments to others for or in behalf of Byron A. Cain, Sally T. Cain, John H. Cain, James B. Cain, Mary A. Cain, or Patricia A. Cain."

for the years 1944, 1945 and 1946. The district court held the assessment and levy void. The government's appeal from that order is pending in this court.[6]

On September 16, 1955, Cain on behalf of himself, and Cain & Culhane, Inc., Homan, and Uptown Federal Savings and Loan Association of Chicago, wrote to the regional commissioner of the internal revenue service, declining to comply with the subpoenas, and stating his reasons therefor, including the statement that the materials referred to had been produced repeatedly for inspection by the government's examining agents. He averred that any further attempt to force production of such records would constitute unreasonable and unnecessary harassment and persecution, and therefore would constitute unreasonable searches and seizures in violation of the fourth amendment to the constitution of the United States as well as a denial of due process of law in violation of the fifth amendment to the constitution.

The treasury department has not attempted to enforce compliance with any of said subpoenas.

Prior to February 7, 1956, the treasury department recommended to the department of justice "that a grand jury investigation be undertaken to determine whether criminal proceedings should be initiated against one or more of [Cain & Culhane, Inc., Byron A. Cain and Sally T. Cain] for certain indicated violations of titles 18 and 26 U.S.C." The department of justice acceded and the attorney general appointed as special assistants Vincent P. Russo and Charles A. McNelis to conduct an investigation. Thereupon, at the behest of the treasury

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[6] *Homan Mfg. Co., Inc.* v. *D. J. Luippold, et al.*, No. 11782.

department and not *sua sponte*, the April 1956 term grand jury commenced an investigation into the income tax returns and allegedly related matters of several of the petitioners.

On April 10, 1956, Russo and McNelis caused a grand jury *subpoena duces tecum* to be issued directed to Leon J. Busby, an accountant who had done work for petitioners, requiring the production of documents, some of which had theretofore been by this court ordered suppressed in the criminal case. Thereupon Homan, Byron A. Cain, Harold E. Sullivan and Frank J. Huebner, by their complaint, asked the district court to quash said Busby subpoena, that Russo and McNelis be enjoined from using any of the material ordered suppressed before the grand jury, and also be enjoined from taking any witness before the grand jury for the purpose of testifying with respect to any part of said material. We affirmed an order of the district court dismissing the complaint. *Homan Mfg. Co., Inc., et al.* v. *Russo*, 233 F.2d 547.

About July 10, 1956, Russo and McNelis caused grand jury *subpoenas duces tecum* to be issued directed to John H. Cain, Trustee of Cain Trust No. 1, a partnership, Byron A. Cain, Harold E. Sullivan and Gladys Morrill, "as officers of Shotwell Mfg. Co.", Byron A. Cain as President of Cain & Culhane, Byron A. Cain as President of Uptown Federal Savings & Loan Association of Chicago, and Martin A. Culhane, as a partner of Cain & Culhane, Inc., a partnership existing during the years 1944 and 1945, returnable before the said grand jury on July 20, 1956. These subpoenas called for all records of said partnership and corporations in so far as they in any way touch or concern transactions with or for Byron A. Cain or any member

of his family, including Sally T. Cain, John H. Cain, James B. Cain, Mary A. Cain or Patricia A. Cain; or with Harold E. Sullivan or any member of his family, including Stella M. Sullivan, Harold E. Sullivan, Jr., and Joseph Sullivan; and Frank J. Huebner, or any member of his family, including Lowell A. Huebner, Frank J. Huebner, Jr., Lorraine Huebner Mannebach, from 1944 through 1952.

Said documents would fill between two and three vans.

The July 10, 1956 grand jury subpoenas in large part duplicate and, in important particulars, are *in haec verba* with the treasury's administrative subpoenas of 1954 and 1955.

About July 13, 1956, Busby complied with the April 10, 1956 subpoena by delivery of sundry documents to the grand jury, which, acting under the advice of Russo and McNelis, thereupon turned the subpoenaed documents over to treasury agents for searching, and recessed for a week.

There are pending in the United States Tax Court eight cases involving an asserted tax liability of Shotwell from 1944 through 1952, and asserted liabilities of Byron A. Cain and Sally Cain and Cain & Culhane, Inc. for divers years, in which cases counsel for the treasury have repeatedly asserted that they are not ready for trial and require additional investigation and preparation.

Petitioners pray that "the grand jury minutes be produced in open court for examination in the premises; that the grand jury be assembled and be inter-

rogated in the premises by the court; that the said assistant attorneys general be admonished or disciplined as to the court may seem meet; that all treasury agents who have received or in any way examined, outside the presence of a quorum of the grand jury duly assembled and in session, any of the documents surrendered under the Busby subpoena be punished for contempt".

The Department of Justice, both through the said Russo and McNelis and otherwise, has repeatedly announced that it is causing said grand jury to investigate as to whether crimes have been committed by petitioners Shotwell, Byron A. Cain, Harold E. Sullivan and Frank J. Huebner. Hence petitioners further pray that, if the court be satisfied that any of the documents surrendered to the grand jury under the said Busby subpoena have been seen or examined by any agents of the grand jury, the jury be instructed that it cannot validly consider any accusations of crime against the said named petitioners or make any inquiries as to them or return any indictments against them to which the said documents or any material in or suggested by them is or are in any way relevant.

They also pray that all of the subpoenas referred to be quashed "because the same constitute aggravated harassment of petitioners, are an unreasonable search and seizure, a violation of due process of law in violation of the several constitutional rights of the several petitioners". Petitioners further pray that the subpoenas be quashed "because they are but a step in an illegal scheme of the treasury to subvert the grand jury subpoena of this court into a tool for a treasury fishing expedition".

During oral arguments in this case, Mr. Russo stated that, in July 1956, following the entry of the order from

which the appeal herein was taken, the aforesaid *subpoenas duces tecum* directed to John H. Cain, et al. were obeyed and the records therein called for were turned over to the grand jury which caused the same to be examined as were the other records procured by prior subpoenas. That examination still continues.

Petitioners charge misuse of the powers of the grand jury. They contend that thereby their constitutional rights under the fourth and fifth amendments of the constitution of the United States are being and will be violated. The fourth amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, * * *."

The fifth amendment provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; * * * nor be deprived of * * * property, without due process of law; * * *."

They claim that, as a result of said violations, they will suffer injury in two areas; first, in the return of indictments against them and, secondly, in civil proceedings for the collection of federal taxes, with interest and penalties. We shall treat of these two areas separately.

Inasmuch as this appeal pertains to an investigation of documents produced in accordance with grand jury subpoenas, the status of the grand jury in our jurispru-

dence is a polestar to guide us. The fifth amendment adopted the grand jury, as it existed at common law, and thereby made it a part of the fundamental law of the United States for the prosecution of crime. No part of the constitution defines the grand jury. No act of congress has ever attempted such a definition.[7] It had its origin in the common law and has existed for many hundred years.

The power of the grand jury is not dependent upon the court but is original and complete, and its duty is to diligently inquire into all offenses which shall come to its knowledge, whether from the court, the prosecutor, its own members or from any source, and it may make presentments of its own knowledge without any instruction or authority from the court. *Cawley* v. *Warren*, 216 F.2d 74, 76.[8]

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[7]While Rule 6 of the Federal Rules of Criminal Procedure, 18 U.S.C.A., adopted under the authority of congress and relating to the grand jury, recognizes the continued existence of the grand jury system in this country, that rule is limited to providing a method for its organization, a manner of returning indictments or no bills, the period for which it serves, provision for relaxation of secrecy by the court, and, by enumeration, a restriction on the persons who may be present during the grand jury's sessions.

[8]In *Ex parte Bain*, 121 U.S. 1, 30 L. Ed. 849, 852, the court quoted with approval the language of Justice Field in a charge to a grand jury:

> "The institution of the grand jury is of very ancient origin in the history of England—it goes back many centuries. For a long period its powers were not clearly defined; and it would seem from the accounts of commentators on the laws of that country that it was at first a body which not only accused, but which also tried, public offenders. However this may have been in its origin, it was at the time of the settlement of this country an informing and accusing tribunal only, without whose previous action no person charged with a felony could, except in certain special cases, be put upon his trial. * * * the institution was adopted in this country, and is continued from considerations similar to those which give to it its chief

In *Costello* v. *United States*, 350 U.S. 359, at 361, the court said:

> "The Fifth Amendment provides that federal prosecutions for capital or otherwise infamous crimes must be instituted by presentments or indictments of grand juries. But neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act. The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders. There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor. The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. Grand jurors were selected from the body of the people and their work was not hampered by rigid procedural or evidential rules. In fact, grand jurors could act on their own knowledge and were free to make their presentments or indictments on such information as they deemed satisfactory. Despite its broad power to institute criminal proceedings the grand jury grew in popular favor with the years. It acquired an independence in England free from control by the Crown or

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value in England, and is designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizens against unfounded accusation, whether it come from the government, or be prompted by partisan passion or private enmity. No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men, selected from the body of the district, shall declare upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial."

judges. Its adoption in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice. And in this country as in England of old the grand jury has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor".

While the grand jury is, in a sense, a part of our court system, when exercising its traditional functions it possesses an independence which is unique. Its authority is derived from none of the three basic divisions of our government, but rather directly from the people themselves. It is unnecessary for us to enunciate general rules as to when a grand jury may so exceed its historic authority as to justify a court in interfering with its investigatorial power. In the case at bar, we are asked to decide only whether the 1956 April term grand jury was acting within its authority in swearing witnesses and then entrusting them with subpoenaed records and documents for the purpose of examination thereof by or under the direction of said witnesses, out of the physical presence of the jury or any member thereof, for the purpose of assisting the grand jury in its deliberations.

While it is true that, at least in a limited sense, the testimony before a grand jury of witnesses who, pursuant to its direction, have examined voluminous records and documents and testify as to what they have found therein, is heresay evidence, that fact would not make it improper for the grand jury to consider it.[9]

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[9]In *Costello* v. *United States*, *supra*, at 362, the court said:

"* * * As late as 1927 an English historian could say that English grand juries were still free to act on their own knowl-

1. In view of the independence of the grand jury and its traditional functions, on the showing made it would be incongruous for the district court to require the grand jury to produce its minutes in open court for examination, to assemble and interrogate it or the members thereof, to admonish or discipline the assistant attorneys general assigned to the grand jury, to instruct the jury that it cannot validly consider any accusations of crime against petitioners, make any inquiries as to them, return any indictments against them, to which

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edge if they pleased to do so. And in 1852 Mr. Justice Nelson on circuit could say 'No case has been cited, nor have we been able to find any, furnishing an authority for looking into and revising the judgment of the grand jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof . . .' *United States* v. *Reed*, 27 Fed. Cas. 727, 738.

"* * * If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.

"Petitioner urges that this court should exercise its power to supervise the administration of justice in federal courts and establish a rule permitting defendants to challenge indictments on the ground that they are not supported by adequate or competent evidence. No persuasive reasons are advanced for establishing such a rule. It would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change. In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in an interminable delay but add nothing to the assurance of a fair trial."

the documents in question are relevant, or that the court should quash the grand jury subpoenas because, it is claimed, they are but a step in an illegal scheme to subvert the grand jury subpoena into a tool for a treasury fishing expedition. On the facts appearing in the petition alone, it would be unwarranted for the court to punish for contempt treasury agents merely because they have received or examined, outside the presence of a quorum of the grand jury assembled and in session, any of the documents surrendered to the grand jury in response to its subpoenas, and it would also be unwarranted for the court to quash all of the subpoenas on the ground of the constitutional violations charged. Any such actions by the district court would be gratuitous.

What we have just said should not be construed as precluding the right of the district court, to which indictments against the petitioners may be returned, from considering, if and when properly raised there, the contentions of the petitioners that their constitutional rights, herein relied on, were violated in the processes culminating in said indictments. Of coure, we express no opinion as to how the district court should then rule. While we hold that the grand jury's actions under the circumstances are immune from interference by the court, we feel that any indictments which it votes, when they reach the court, carry no immunity from the application of the court's established criminal procedure.

2. In this country, as in England of old, the grand jury acts in secret. *Costello v. United States*, supra, at 362. Grand jury proceedings are traditionally secret. *United States* v. *Rose*, 215 F.2d, 617, 628. From earliest times it has been the policy of the law to shield the proceedings of grand juries from public scrutiny. Courts

and text writers have advanced various reasons for this rule of secrecy. For a comprehensive review of this matter see *Goodman* v. *United States*, 108 F.2d, 516, 519, 127 A.L.R. 265 and the annotation at 272. See, also, *Reichert* v. *Commissioner of Internal Revenue*, 214 F.2d, 19, 22.[10]

The uncontradicted facts in this case in themselves point to an additional reason. The government had by various administrative subpoenas endeavored to gain access to the documents and records referred to in the petition. Having failed in that effort, government counsel made no effort to compel compliance with said subpoenas. Evidently they abandoned all civil procedures available to them. Instead they resorted to grand jury subpoenas and thereby brought those documents and records before the grand jury. With the consent of the grand jury this material has been turned over to treas-

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[10]In the *Reichert* case, in speaking of a state statute dealing with grand juries, we quoted the reasons for secrecy as stated in *Schmidt* v. *U.S.*, 115 F. 2d 394, at 396, by way of quotation from *U.S.* v. *Amazon Industrial Corp.*, 55 F. 2d 254, 261:

"'(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt. It is obvious that the basis of all but the last of these reasons for secrecy is protection of the grand jury itself, as the direct independent representative of the public as a whole, rather than of those brought before the grand jury."

ury agents, who, with their assistants, have been examining it. If these efforts are directed toward the procuring of evidence for civil proceedings now or hereafter pending against petitioners, and that purpose is accomplished, then the secrecy of the grand jury has been breached. We find nothing in the history of the grand jury to justify the perversion of its functions or machinery by third persons for the purposes of a civil proceeding. The fifth amendment's adoption of the grand jury for use in the United States was for the historic purpose of initiating prosecutions for serious crimes. With the grand jury came its time-honored policy of secrecy. The idea that information obtained from the perusal of material in the possession of a grand jury may be used for the purpose of a civil proceeding is in direct conflict with the policy of secrecy of grand jury proceedings.

Moreover, the public has an interest in maintaining the secrecy of the grand jury. This is because the grand jury is the direct, independent representative of the people as a whole rather than those brought before it. The application of secrecy to its proceedings is a safeguard for the grand jury itself, because it tends to prevent it from being used as an instrument for explorations in aid of civil proceedings. Otherwise such misuse of the grand jury's time and functions might in a substantial degree interfere with its investigation of crime and the return of indictments and no bills.

We are aware that it has been held that, if, after an indictment has been found and made public and the defendant has been apprehended, *Metzler* v. *United States*, 64 F.2d, 203, 206, and the grand jury discharged, *Atwell* v. *United States*, 162 Fed. 97, 101, a disclosure becomes essential to the attainment of justice

and the vindication of the truth, the rule of secrecy may be relaxed in the discretion of the court. This responsibility should reside in the court, of which the grand jury is a part and under the general instructions of which, it conducts its "judicial inquiry". *Schmidt* v. *United States*, 115 F.2d 394, 397. But, in the cases just cited, the purposes for relaxation of secrecy were fundamentally different from the government's purpose in searching for evidence, in the case before us. Therefore, in the situation presented to us in the case at bar, we hold that the safeguard of secrecy, in the interest of the public, continues even after the grand jury has completed its efforts and therefore forbids any use in civil proceedings of information derived by or through an examination of records and documents made under the authority of the grand jury.

It is significant that the government's counsel, in their brief herein, first, do not challenge the proposition that a grand jury subpoena cannot be used for the purpose of obtaining evidence to be used in a civil proceeding; and secondly, do not disclaim an intention to use, in civil proceedings, information gleaned from examination of the records and documents subpoenaed by the grand jury in this case.

We said in *Homan Mfg. Co., et al.* v. *Russo, et al.*, 233 F.2d 547, that the proceedings of the grand jury are secret but that we had no right to presume that the grand jury would permit records covered by its subpoenas to be diverted to the use of third persons, or that defendants propose or intend such diversion. We added that such a proposed use, if attempted, would invoke the protective power of the district court, which could act either contemporaneously or afterward in connection with such attempt. The admitted facts now before

us show that there is a need for the exercise of the protective power of the district court.

3. While we hold that the district court cannot properly interfere with the action of the grand jury in turning over to third persons, including treasury agents, voluminous records and accounts for the sole purpose of examination and report to the grand jury, as an assistance to it, we also hold that persons, nonmembers of the grand jury, thus having access to said records and documents, have no right to use them for any purpose whatsoever except to assist the grand jury in its work. Such persons may not in any manner use these records and documents, or any information acquired therefrom, for any other purpose, and specifically for any civil purpose, such as tax collection or otherwise. The right to freedom from interference by the court, which the grand jury enjoys, does not extend to such treasury agents or other third persons, including those who work with, under, or superior to said treasury agents. The direct or indirect use of any of the records and documents in question, or any information gained therefrom, in any civil proceeding can be prevented if objection is timely made therein. Moreover, the protective power of the district court should now be used to restrain any of such persons from in any manner violating the secrecy which enveloped these records and documents when the grand jury turned them over for examination. Such a restraining order should, of course, be in such detail and directed to such persons as to make it capable of effective enforcement. Thus, these are some of the ways in which the courts can and should implement the constitutional guarantees upon which the petitioners here rely. While, *in a criminal prosecution* based upon indictments of these petitioners (if they are indicted) they will be required to await

the return of said indictments before having a hearing in the trial court on their contentions that their constitutional rights were violated, we think it is now apparent that, as far as *civil proceedings* are concerned, the production of these records and documents pursuant to a grand jury subpoena, if followed by their use in any manner for the purposes of such a civil proceeding against petitioners, violates their constitutional rights under the hereinbefore quoted provisions of the fourth and fifth amendments.

For the reasons herein set forth, the order from which this appeal was taken, is reversed and this cause is remanded to the district court for further proceedings not inconsistent with the views herein expressed.

REVERSED AND REMANDED
WITH DIRECTIONS.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 613

VALLEY BELL DAIRY CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. 1a–19a) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 1956 (Pet. 21a). The petition for a writ of certiorari was filed on December 7, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the court below had jurisdiction to issue a writ of mandamus correcting actions of a district

court in its supervision of proceedings before a grand jury prior to indictment.

2. Whether the court, in granting the Government's petition for a writ of mandamus, appropriately exercised its discretionary authority in (a) requiring the District Judge to permit continuation of the grand jury's investigation, (b) vacating the orders restricting the Government's receipt of a transcript of the evidence taken before the grand jury, and (c) vacating his orders quashing certain subpoenas *duces tecum*.

STATUTE AND RULES INVOLVED

Section 1651 (a) of Title 28, United States Code, provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Rule 6 of the Federal Rules of Criminal Procedure provides in part:

> (d) WHO MAY BE PRESENT. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer may be present while the grand jury is in session but no person other than the jurors may be present while the grand jury is deliberating or voting.
>
> (e) SECRECY OF PROCEEDINGS AND DISCLOSURE. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the per-

formance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. * * *

* * * * *

(g) DISCHARGE AND EXCUSE. A grand jury shall serve until discharged by the court but no grand jury may serve more than 18 months. The tenure and powers of a grand jury are not affected by the beginning or expiration of a term of court. At any time for cause shown the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another person in place of the juror excused.

Rule 17 (c) of the Federal Rules of Criminal Procedure provides:

A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or

objects or portions thereof to be inspected by the parties and their attorneys.

STATEMENT

In March, 1956, the Attorney General authorized attorneys of the Department of Justice to present evidence to a grand jury in the Southern District of West Virginia in order that it might determine whether indictments for violation of the federal antitrust laws should be returned against persons or corporations engaged in the milk industry in that area. At the request of the attorneys so authorized, Judge Ben Moore of the Southern District recalled the grand jury of that court to conduct the investigation, and he charged the grand jury with respect to this investigation on April 30, 1956.

A few days later attorneys representing petitioner Valley Bell Dairy Co., Inc., moved to quash a subpoena duces tecum served on it insofar as the subpoena called for production of the following: (1) minutes of meetings of its board of directors and executive committee; (2) its annual balance sheets and profit and loss statements; (3) its total annual sales of milk and other dairy products; (4) its prices, terms and conditions of sale of milk and other dairy products, to the extent not disclosed by the response to an earlier subpoena, and (5) annual reports to stockholders (Appendix,[1] pp. 2–4). The subpoena command as to

[1]The entire transcript of the proceedings with reference to the grand jury's investigation, heard in open court, has been filed with the Clerk of this Court. Pertinent excerpts therefrom are set forth in the Appendix submitted with this brief. The Appendix also includes the order of the district judge adopting his oral rulings in the course of the grand jury investigation as "the formal orders of this Court" (App., pp. 60–61).

items (2)–(5), inclusive, was limited to the period subsequent to January 1, 1951 (*ibid.*).

The district court ruled that the Government must show, in response to the motion, the materiality of the information sought "and in some way establish that there is good reason to believe that the documents themselves when examined will produce the information" (Appendix, p. 4). The court, in granting the motion, emphasized that the subpoena had issued before the grand jury had begun hearing evidence, and said that if the grand jurors should ask for the documents "they will probably get them" (*id.*, pp. 8–9). However, when the grand jury later reported that it had voted overwhelmingly to have the documents produced (*id.*, p. 12), the district judge characterized this action as being "just an attempt to circumvent the order of the court," and granted a renewed motion to quash (*id.*, p. 32).

Some days later the district judge ruled that Government counsel might not examine any of the documents produced pursuant to subpoena except in the presence of the grand jury (*id.*, pp. 16–17), and notified the stenographer whom the Government had employed to transcribe the evidence at the grand jury hearing that the transcript thereof was not to be delivered to Government counsel (*id.*, pp. 34). Subsequently the district judge addressed a letter to the Government attorneys prescribing conditions for their access to the transcript (*id.*, pp. 53–55). This letter reads in pertinent part (*id.*, p. 54):

> 2. I do agree with you gentlemen that it is proper for you to have from the stenog-

rapher a transcript of the evidence for the purpose of carrying out the duties which you list on page 5 of your brief, namely: "1) the conduct of a thorough investigation; 2) the preparation of the indictment; and 3) preparation for trial."

3. You will be permitted therefore to receive from the stenographer a transcript of the evidence taken down by him, for the purposes mentioned. This means that if indictments are returned by the Grand Jury you will be permitted to retain the transcript insofar as it relates to persons or corporations then under indictment, for use in preparing for trial and prosecuting the cases to a conclusion. However, if no indictments are found by the Grand Jury or if certain persons or corporations under investigation are not indicted, the transcript relating to such persons or corporations as are not indicted will be returned to the Clerk of the Court as custodian thereof for the Grand Jury.[2]

4. During the use of the transcript by counsel for the government prior to indictment, it should be kept strictly confidential, and no copies made thereof.

5. Your receipt of a transcript from the stenographer will constitute your acceptance of the conditions as to its use which are set out above.

On May 24, 1956, the grand jury came into court and its foreman stated that the grand jury had decided to

[2] When, as is detailed below, the court terminated the grand jury's investigation, it ordered the stenographer to deliver his notes to the clerk of the court to be held by him under seal (*id.*, p. 45).

recess until September 10, 1956, at which time it would "consider the evidence from its transcript and call for further evidence if necessary" (*id.*, p. 33). In further explanation, the foreman stated that there had been about 45 witnesses and "such a mass" of evidence that the jury did not feel that it could give all the evidence consideration in the absence of a transcript or a digest thereof (*ibid.*). Judge Moore refused to permit such recess (*id.*, p. 34). Five days later the grand jury reported that it had nothing further to investigate "at this time" and that it was not prepared to consider indictments "at this time" (*id.*, p. 35).

The district judge then suggested that the grand jury meet in executive session and decide on the evidence already presented whether indictments should or should not be voted (*id.*, pp. 36–37). The court was then informed that the jury had voted against ending the investigation and in favor of continuing it in due time (*id.*, p. 38). The court thereupon advised the jury that it "must take action of some kind at this time," that those engaged in the dairy business in that locality "are entitled to have charges made against them by means of indictments of the grand jury or to have this grand jury say that they are not going to find any true bills" (*id.*, pp. 38–39).

In the afternoon of the same day the grand jury reported to the court that "it did not want to vote on the question of indictment at this time," whereupon the court informed the grand jury that it "will remain the grand jury of the court until the court calls another grand jury in connection with the Novem-

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ber term but you will not be required nor permitted to have any further sessions unless you are called in by the court" (*id.*, pp. 44–45). On June 1, the court denied a motion by Government counsel that the court issue appropriate instructions for reconvening the grand jury on or about September 15, 1956 (*id.*, pp. 58–60).

On September 28, 1956, the Government filed a petition with the Court of Appeals for the Fourth Circuit, praying that a writ of mandamus be directed to the Judge of the United States District Court for the Southern District of West Virginia. The petition asked that Judge Moore be directed to vacate the order inhibiting the grand jury from completing its investigation, to vacate the order imposing conditions upon delivery of the transcript of the grand jury proceedings to the Government, and to vacate the order granting the motion to quash the subpoena duces tecum.

After the petition was filed, the district judge wrote a long letter to Chief Judge Parker (Pet. 24a–36a), which the court of appeals accepted as the district judge's "answer" to the petition for a writ of mandamus (Pet. 2a). The court also granted the petition filed by some of the corporations under investigation by the grand jury, for leave to intervene and to file a motion to dismiss the Government's mandamus application (Pet. 2a–3a).

In an opinion rendered on November 13, 1956, the court of appeals unanimously held that the Government is entitled to a writ of mandamus directing the district judge to reconvene the grand jury for continuation of its uncompleted investigation, and to

vacate his orders quashing subpoenas *duces tecum* and limiting the Government's receipt and use of a transcript of the grand jury evidence (Pet. 1a–19a). The court stated that it assumed that actual issuance of the writ will not be necessary "now that this court has passed upon the questions involved" (Pet. 19a). The court accordingly entered an order granting the Government's petition for a writ of mandamus, but stating that "the formal writ of mandamus will not actually issue unless further order be entered to that effect" (Pet. 21a). On the motion of the defendant-intervenors for a stay pending application to this Court for a writ of certiorari, the court of appeals, on November 26, 1956, granted a stay provided such application was filed in this Court within 15 days of its stay order (Pet. 22a–23a).

ARGUMENT

I

THE COURT OF APPEALS HAD JURISDICTION TO ISSUE THE REQUESTED WRIT OF MANDAMUS

Federal courts are authorized by 28 U. S. C. 1651 (a) to "issue all writs necessary or appropriate in aid of their respective jurisdictions". The court below, having exclusively appellate jurisdiction, had authority to issue such writs only "in aid of" that jurisdiction. That authority, however, "is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected". *Roche* v. *Evaporated Milk Association,* 319 U. S. 21, 25, and cases cited.

Writs of mandamus may therefore be issued in aid of potential appellate jurisdiction; indeed, the legal possibility of a hearing in the appellate court is sufficient ground for issuing the writ. This Court may issue the writ to a district court in a case in which appeal is to a court of appeals because of this Court's discretionary appellate jurisdiction, *i. e.*, review of the decision of the court of appeals by writ of certiorari. *Ex parte Peru,* 318 U. S. 578, 584–585; *Ex parte United States,* 287 U. S. 241, 248–249. Since the statute protects appellate jurisdiction which might otherwise be defeated by unauthorized action of a lower court, "ultimate power of review" provides basis for exercise of the authority conferred. *United States* v. *District Court,* 334 U. S. 258, 263.

The writ may issue to prevent a district court from aborting an action in its incipiency. *Ex parte United States, supra.* In that case this Court, resting its jurisdiction on its ultimate power of review by certiorari, granted mandamus to compel a district judge to vacate an order denying an application for a bench warrant after an indictment had been returned. Within these principles, the writ may issue to prevent a thwarting of a grand jury investigation which would defeat the appellate court's jurisdiction to review proceedings growing out of indictments which might have been returned had the grand jury not been thwarted. In this connection, the court below said (Pet. 9a):

> We see no reason why these principles should not be applied to the potential litigation

> involved in a grand jury investigation. Such litigation, if commenced, lies within the appellate jurisdiction of this court; and if that jurisdiction is being thwarted by erroneous exercise of power or abuse of discretion by the District Judge, there is no more reason why this court should not exercise its power than in the case where the judge is refusing to issue a bench warrant. It is argued that a grand jury might not find indictments, in which event there would be nothing with respect to which appellate jurisdiction could be exercised; but, of course, there would have been nothing with respect to which appellate jurisdiction could have been exercised if the trial of the person arrested under the bench warrant had resulted in an acquittal.

Petitioners contend (Pet. 18) that a writ of mandamus may not be predicated upon potential "litigation."[3] But unauthorized interference with the grand jury's function in determining whether indictments should be returned not only defeats potential appellate jurisdiction, but defeats it in an area of the law of wide public import. "The Constitution itself makes the grand jury a part of the judicial process * * *. The proceeding before a grand jury constitutes 'a ju-

[3] The phrase "in aid of" appellate jurisdiction is elastic and flexible in meaning, and embraces issuance of writ of mandamus or other common law writs, the result of which is to eliminate the possibility of subsequent appellate review. In *Ex parte Peru*, 318 U. S. 578, this Court issued the writ to direct dismissal of a district court suit, and in *Chicago, R. I. & P. R. R. Co.* v. *Igoe*, 220 F. 2d 299 (C. A. 7), certiorari denied, 350 U. S. 822, a court of appeals directed transfer of a pending case outside the circuit.

dicial inquiry,' *Hale* v. *Henkel,* 201 U. S. 43, 66, of the most ancient lineage. * * * It is no less important to safeguard against undue interruption the inquiry instituted by a grand jury than to protect from delay the progress of the trial after an indictment has been found." *Cobbledick* v. *United States,* 309 U. S. 323, 327.

Petitioners read into the "all writs" statute an implied limitation on its scope which we believe to be inconsistent with the broad purposes it was designed to serve. Under their interpretation a district judge could, without restraint, misuse judicial power by stopping a grand jury investigation of crime or by forbidding return of indictments against specified persons. In the present case, the court below held that there had been "an unwarranted interference with the proper functioning of the grand jury" (Pet. 13a). If the court below was without jurisdiction to issue a writ of mandamus, then there is no available corrective action within the judicial system no matter how gross the interference with "the sole method [provided by the Constitution] for preferring charges in serious criminal cases." See *Costello* v. *United States,* 350 U. S. 359, 362.

II

THE COURT OF APPEALS, IN GRANTING THE GOVERNMENT'S PETITION FOR A WRIT OF MANDAMUS, APPROPRIATELY EXERCISED ITS DISCRETION WITH RESPECT TO THE GRANT OF THIS WRIT

The writ of mandamus, like equitable remedies, may be granted or withheld in the "sound discretion" of the appellate court, and the proper exercise of this discretion is not governed by formal rules but is to be determined in the light of all the circumstances of the particular case. *Roche* v. *Evaporated Milk Association,* 319 U. S. 21, 25–26. Accordingly, if issuance of mandamus was "in aid of" the appellate jurisdiction of the court below, as we have contended in Point I, the other questions presented by the petition for certiorari primarily involve the question whether the court below exceeded the limits of its allowable discretion in determining to grant the Government's application for writ of mandamus.

In the present case the action against which the writ of mandamus was directed is not now, and will not later be, embodied in any final, appealable judgment. The fact that there is no available remedy other than mandamus is a consideration strongly supporting exercise of discretion in favor of grant of mandamus. *Ex parte Peru, supra,* at 584. Absence of alternative remedies is a weighty factor in making extraordinary remedies available. *Maryland* v. *Soper,* 270 U. S. 9, 30; *Ex parte American Steel Barrel Co.,* 230 U. S. 35, 45; *De Beers Consolidated Mines, Ltd.* v. *United States,* 325 U. S. 212, 217.

Mandamus was granted to prevent "a clear invasion of the grand jury's powers" (Pet. 15a). In view of the important role of the grand jury in our constitutional system, the District Judge's invasion of its power brought the matter within the category of cases of "public importance and exceptional character," which warrant exercise of discretion in favor of grant of the writ of mandamus. See *Ex parte Peru, supra,* at 586.

1. *The direction that the District Judge permit continuation of the grand jury's uncompleted investigation*

The grand jury wished to continue its investigation after a recess which would enable it to make an evaluation of the evidence, but the District Judge refused to allow this continuation (*supra,* pp. 7–8). Previously, the District Judge had pressed the grand jury to vote immediately on the question of indictment, although a complete evaluation of the evidence had been hindered by his own rulings barring delivery to the Government of a transcript of the grand jury evidence and Government examination of subpoenaed documents except in the grand jury's presence (*supra,* p. 5). In short, the orders of the District Judge both impeded progress of the grand jury's investigation and foreclosed later investigation by it. Under the decisions, this was "a clear invasion of the grand jury's powers" (Pet. 15a).

It has been the policy of the law from an early date to promote the complete independence of the grand jury and its freedom from external pressure,

including freedom from control and direction by the court which called it into being. In *United States* v. *Thompson,* 251 U. S. 407, the district court had quashed an indictment upon the ground that, after an alleged offense had been submitted to a grand jury which had failed to find a true bill, the district attorney had no authority to resubmit the same matter to another grand jury without the approval of the court, and the district court ruled that the grand jury and its proceedings "are under the control of the court." 251 U. S. at 411. This Court, in unanimously reversing, stated that it was settled that the power and duty of the grand jury to investigate "is original and complete" and not "dependent for its exertion upon the approval or disapproval of the court," and that the grand jury's power, being continuous, was not exhausted or limited by adverse action taken by a prior grand jury. *Id.,* at 413. See also *Costello* v. *United States,* 350 U. S. 359, 362; *United States* v. *Johnson,* 319 U. S. 503, 510–511; *Blair* v. *United States,* 250 U. S. 273, 280, 282.

2. *The direction that the District Judge not restrict the Government's receipt of a transcript of the evidence taken before the grand jury*

The court below ruled that it was "an unwarranted interference with the proper function of the grand jury and of government counsel who were assisting them in the investigation for the court to forbid counsel to have a transcript of the testimony" taken before the grand jury (Pet. 13a).

Rule 6 (d) of the Federal Rules of Criminal Procedure explicitly authorizes a stenographer to remain in the grand jury room "for the purpose of taking the evidence." The Advisory Committee which drafted these Rules stated that Rule 6 (d) is intended to continue the law as set forth in the Act of May 18, 1933, 48 Stat. 58, 18 U. S. C. 556 (1940 ed.).[4] That Act authorized attendance before the grand jury of one or more stenographers "employed in a clerical capacity to assist the district attorney or other counsel for the Government who shall, in that connection, be deemed to be persons acting for and on behalf of the United States in an official capacity and function."

The district judge's position was that the transcript is for the use of the grand jury, and that a court's general powers with respect to grand juries embrace power to control the Government's receipt and possession of the transcript. But the making of a transcript and its retention by the Government is really only incidental to the right to be present at grand jury sessions; it only makes more effective the right specifically granted.

Judicial decisions, both before and after the 1933 statute, are unanimous in holding that the Government is entitled to retain, without restrictions or conditions, the transcript of testimony taken before a grand jury. The leading case, which has never been overruled or questioned, is *In re District Attorney*, 7

[4] See note to Rule 6 (d), following 18 U. S. C. 3771 (1952 ed.); Sen. Doc. No. 175, 79th Cong., 2d Sess., p. 11; note to 18 U. S. C. 556 (1946 ed.).

Fed. Cas. 745, 746, No. 3,925 (C. C. W. D. Tenn. 1872). See also *United States ex rel. McCann* v. *Adams*, 3 F. R. D. 396 (S. D. N. Y., 1944).

We believe it to be the practically universal practice for the Government to receive and retain transcripts of grand jury testimony. The courts have repeatedly recognized the Government's right to the transcript, particularly in cases in which defendants have asserted the right to examine transcripts in the custody of the Government.[5]

Petitioners contend that the decision below, insofar as it finds error in the District Judge's rulings on the Government's receipt of a transcript of the grand jury evidence, is in conflict with *Cain* v. *United States*, decided by the Court of Appeals for the Seventh Circuit on November 13, 1956.[6] The court there found that the facts gave support to the claim that subpoenas calling for the production of documents before a grand jury investigating criminal violation of the federal income tax laws had been issued pursuant to a scheme to utilize the docu-

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[5] *United States* v. *Weathers*, 21 F. Supp. 763, 765 (N. D. Ga., 1937), *United States* v. *Simmons*, 46 Fed. 65, 66 (C. C. S. D. N. Y. 1891); *United States* v. *Procter & Gamble Co.*, 47 F. Supp. 676, 680 (D. Mass., 1942); *United States* v. *Amazon Industrial Chem. Corp.*, 55 F. 2d 254 (D. Md., 1931); *In re Grand Jury Proceedings*, 4 F. Supp. 283 (E. D. Pa., 1933); *United States* v. *Byoir*, 58 F. Supp. 273, 275 (N. D. Texas, 1945), affirmed *per curiam*, 147 F. 2d 336 (C. A. 5); *Metzler* v. *United States*, 64 F. 2d 203, 206 (C. A. 9, 1933); *United States* v. *Skurla*, 126 F. Supp. 711 (W. D. Pa., 1954); *United States* v. *General Motors Corp.*, 15 F. R. D. 486, 488 (D. Del., 1954).

[6] The opinion is set forth in the Appendix to the petition for writ of certiorari (Pet. 37a–55a).

ments or information thereby obtained as evidence in pending civil tax proceedings. The court upheld the action of the district court in refusing (1) to quash such subpoenas, (2) to admonish the Government attorneys assigned to the grand jury investigation and (3) to punish for contempt the Treasury agents who had been permitted to examine the subpoenaed documents out of the presence of the grand jury. But the court ruled that it was improper to use the subpoenaed documents in civil proceedings for tax collection purposes and that the district court should enter an appropriate order barring such use.

The decision in the *Cain* case rests on the court's conclusion, based on the particular circumstances presented to it, that there had been shown sufficient probability of an improper use of the grand jury process to warrant a protective court order. The decision is not, we submit, in conflict with that in the instant case. Apart from the obvious differences in the factual situations, the court below recognized and declared that corrective action should be taken if the Government attorneys should "make an improper disclosure of what has occurred before the grand jury or make other improper use of the evidence there taken" (Pet. 14a). The court did not determine that the use in other proceedings of information so obtained would be proper. But, as the court further stated, "this is no reason why the [district] court should hamper them in the proper discharge of their duties by denying them free use of the evidence" (Pet. 14a–15a). The mere possibility that the transcript might be improperly used at some future time was held not to warrant the

restrictions imposed by the District Judge since, in the event of such improper use, the courts have ample power to protect the rights of those thereby injured.

3. *The direction that the district judge vacate his orders quashing certain subpoenas*

The court below held that the quashing of the subpoenas served on petitioner Valley Bell Dairy Co., Inc., was "clearly erroneous" (Pet. 11a). We have already set forth the nature of the documents as to which the subpoenas were quashed (*supra*, p. 4). We submit that the documents were, by their very nature, material to the inquiry in which the grand jury was engaged. The court below correctly said that the records withheld from the grand jury by the orders to quash "are precisely the sort of records that are ordinarily examined in investigations to determine whether prosecutions under antitrust laws are to be instituted" (Pet. 13a).

Rule 17 (a) of the Federal Rules of Criminal Procedure provides that the Clerk of the court shall issue subpoenas to parties requesting them, and subsection (c) provides that where a subpoena commands the production of documents the court may quash or modify the subpoena if compliance would be "unreasonable or oppressive." But, as the court below said, no showing was made that compliance with the subpoena demand for production of the records in question "would have been either unreasonable or oppressive and the action of the [district] judge was based, not on that ground, but on the ground that their materiality was not shown" (Pet. 12a–13a).

The District Judge cast upon the Government the burden of showing that the demands would bring forth evidence material to the charge under investigation, and thereby required of Government counsel clairvoyance as to what would be disclosed if the subpoenas were honored. Plainly, there was no warrant for this requirement. In *Brown* v. *United States,* 276 U. S. 134, this Court unanimously upheld a conviction for contempt against an officer of a trade association who had refused to comply with a subpoena. The contention that the subpoena failed to show that the documents described were "important or material" and that it called for production of many documents "of no evidentiary value" (*id.*, at 140) was summarily disposed of as follows (*id.*, at 143):

> The probable materiality of the documents is sufficiently indicated by the descriptions of their subject matter contained in the subpoena.[7]

In the instant case the court below correctly said: "We know of no law requiring that evidence be material before a grand jury have the right to consider it" (Pet. 13a).

CONCLUSION

The decision below is correct, there is no conflict of decisions, and no other reason appears for the

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[7] The subpoena called for the production of correspondence relating to, among other things, general meetings of the association, zone meetings of its members, costs of manufacture, grading of various goods, rumors of charges of price cutting, cost bulletins, conditions obtaining at various furniture markets, and manufacturers maintaining a fair margin of profit. *Id.*, at 138–139.

grant of review. Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1957.

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Excerpts from Transcript of Proceedings in Open Court before the United States District Court for the Southern District of West Virginia, In re Grand Jury Proceedings

April 30, 1956 (Charge to Grand Jury):

You are called back because of a request made to the court by a special attorney from the Antitrust Division of the Department of Justice. There is in that department, as you know, a division which is given the specific duty of inquiring into and making investigations with reference to reported violations of what we call the antitrust laws.

It was represented to me that in this vicinity there is reason to believe—that is, the Department of Justice through its Antitrust Division has reason to believe that there may be violations of these antitrust statutes on the part of dairymen, persons in the business of supplying and selling milk and dairy products.

* * * * *

I understand that what will be presented to you will be evidence which the government believes tends to show that there have been agreements fixing prices and probably agreements with reference to merchandising practices of various kinds which the government believes are restraints on interstate commerce. I think you will probably have no difficulty as to whether the acts are acts in interstate commerce. Of course, if what is presented to you has to do merely with a purely local situation, then you would have no business considering it since it couldn't be a violation under Sections 1 and

2, but obviously the distribution of milk and dairy products in large quantities over a great area, including some areas outside the state, does actually come into interstate commerce, both as being a part of interstate commerce and as directly affecting other parts of interstate commerce, so that angle of it will not give you much trouble.

May 2, 1956:

Mr. CASTO: If the court please, I appeared a few days ago before the court and made an oral motion to quash a subpoena duces tecum which had been served on the Valley Bell Dairy. At that time a conference was arranged between Mr. Moore, Mr. Pickering and myself, they representing the Antitrust Division of the Department of Justice. We agreed in part and in part we do not agree. I now appear before the court and move to quash the subpoena duces tecum insofar as it relates to five separate items as set forth in that subpoena.

The first item is that the request as contained in paragraph six on page two, which would require the Valley Bell Dairy Company to submit to the grand jury all minutes of the meetings of the board of directors and executive committees from the date of the formation of this corporation to date hereof, for the reason that said request is too sweeping to be reasonable as to time and particulars, and that said minutes of the meetings have no bearing on the matters now being investigated by the said grand jury.

We can only assume what is being investigated from the department from which it comes and from the instructions of the court to the grand jury a few days ago. The fact is this corporation was formed in 1921.

Under this requirement we would be required to submit all the minutes from that date down to date. Maybe they are available. I don't know. I haven't looked into that.

Second, that to require the Valley Bell Dairy Company to submit its annual balance sheets and profit and loss statements from January 1, 1951, to and including the most recent of such sheets and statements, as requested, is a matter of private business, has no bearing on the matter now under investigation, is too broad and indefinite, and is in effect unreasonable search and seizure.

Third, that to require the Valley Bell Dairy Company to submit documents or lists prepared to show the total annual sales of that company during the period January 1, 1951 to April 1, 1956 in quantity and dollar volume of milk and other dairy products is too sweeping to be reasonable, too broad and too indefinite, and would not afford any information to the matters now being investigated by the grand jury, and would only tend to inflame the minds of the jurors and prejudice the Valley Bell Dairy Company.

Fourth, that the additional documents or lists as requested in paragraph twelve of said subpoena duces tecum is not a proper subject for investigation by the grand jury.

Paragraph twelve relates to any private contracts which the Valley Bell Dairy Company might have with any of its users.

Fifth, that the request for all annual reports submitted to the board of directors, stockholders, or officials of the company for the period from January 1, 1951 to the date of this subpoena is an unreasonable re-

quest, too broad and too indefinite, amounts to unreasonable search and seizure, and would furnish information to which the grand jury and/or the office of the Antitrust Division of the Department of Justice is not entitled and has no bearing upon this investigation.

* * * * *

The COURT: The grand jury is under obligation of secrecy and I think that in any case where objection is made on the ground of immateriality that if it is shown that certain phases of the documents are immaterial that the court would then direct counsel for the government not to present any of those immaterial facts to the grand jury, if they are facts such as you say are objectionable to be brought out. Of course, if entire documents are immaterial, then the court would sustain your motion to quash the subpoena with reference to those documents, so in order to sustain the materiality of these documents it is necessary that the government show the court on this motion the materiality of the information it is seeking from the documents and in some way establish that there is good reason to believe that the documents themselves when examined will produce the information.

The court is not going to permit in this or any other case a wholesale investigation that is not grounded on some reasonable belief. The grand jury has complete investigative powers but is not justified in making examinations into private business unless there is a starting point, that is, unless there is a belief based on some reasonable facts known to the government that there is ground for that investigation, and if there is such a

belief the investigation must be given such scope as will produce all the material information.

If counsel for either side do not agree with those principles you had better say so now so that we can clear them up.

Mr. MOORE: If your honor please, I am in complete agreement. The government is in complete agreement with the principles as you state them. I think, even though I am not prepared to fully argue the government's position at this time with respect to the motion as made by Mr. Casto, I would like to point out only one thing, that under the Sherman Act, as we are all well aware, there is a Section 1 which refers to restraints of trade, and Section 2, which refers to monopoly.

The COURT: Yes.

Mr. MOORE: And it is our position that at least dollar volume of sales of any company being investigated under Section 2 of the Sherman Act would be relevant, that any documents which Mr. Casto would submit to the court pursuant to his offer of submitting them to the court, I would like to have the court keep in mind that the total dollar volume of sales of a product would be pertinent to an inquiry of monopoly.

The COURT: Only as corroborative of something else. If you have other substantial evidence of monopoly, the bigness might enter in but bigness alone is not any evidence of monopoly.

Mr. MOORE: That is absolutely true, your honor. The government agrees, but here we are not concerned with the guilt or innocence so much but as to the relevance for purposes of the grand jury's inquiry. In other words, what might be wholly irrelevant in a trial

of the matter might be relevant insofar as the grand jury is investigating that matter.

The COURT: If you have some probable basis on which to proceed, that's true, but when you say the guilt or innocence is irrelevant you certainly depart very far from the court's ideas. All proceedings before the grand jury have to do with guilt or innocence, just as a trial does.

It is true that the grand jury is not weighing the two sides but a grand jury must exercise a judicial function in determining whether certain facts establish prima facie guilt, and therefore anything that does not tend towards establishing prima facie guilt is entirely irrelevant.

Mr. MOORE: I agree, your honor. The point I am trying to make is that when the grand jury is going into this statute the grand jury is going to have to decide whether there is probable cause to believe that the statute has been violated, and my remarks are only directed to Section 2 of the statute with respect to these annual sales figures. If the grand jury is looking to see whether evidence exists to establish probable cause, it is our position that the degree of relevancy there is not as stringent as in a trial of that matter.

The COURT: The same rule. Exactly the same rule applies as to relevancy.

May 4, 1956, at 10:00 a. m.:

The COURT: I want you to answer that question. I said are you contending that questions of relevancy or materiality are not to be considered on a motion to quash the subpoena duces tecum and you say in part, and so I ask you to explain in what part you contend

that they are not to be considered and in what part you admit that they are to be considered.

Mr. MOORE: I admit that materiality could be considered if there was shown a clear abuse of authority. In other words, what I mean by that is that there is absolutely no color of authority or materiality, let's say, in asking for these particular documents. If that is shown, then certainly materiality could be gone into, but here is another problem that raises itself. If we go into materiality, what must we not show? Are we not perhaps, at least in open court, endangering the secrecy of the grand jury proceedings?

The COURT: The grand jury hasn't proceeded on it until they get it.

Mr. MOORE: Let me say this: the grand jury has been called and charged to look into this matter. A subpoena has been served. A motion has been filed to quash that subpoena because the documents are immaterial to the grand jury's inquiry. Have I reviewed this properly?

The COURT: Yes.

Mr. MOORE: Now what must be done? Are we to show in open court how this material, how the documents asked for in the subpoena are material to the inquiry? If we do I am afraid that we might violate the secrecy of the grand jury's proceedings. Actually, if a grand juror has knowledge of a given type of activity of his own knowledge, that would seem to me to be enough to ask for documents to see if that is true, and that's all we are trying to do, just to see if the evidence produced——

The COURT: Let me stop you. You say what you are trying to do is base your subpoena on the desire of some grand juror who knows?

Mr. MOORE: I am not saying that. I am saying these are the possibilities that could occur and I don't want to get into a discussion of what has transpired before the grand jury because of the secrecy surrounding that body.

The COURT: No, but you have said awhile ago that you admitted that for clear abuse that a subpoena duces tecum should be quashed because the items called for are immaterial or irrelevant. How is the court going to find out whether there is an abuse unless the court can look into that materiality?

Mr. MOORE: I don't deny the right of the court to look into it, but I think that in open court that might endanger the secrecy of the grand jury.

* * * * *

Mr. MOORE: This question of not letting the grand jury see the documents, doesn't that hobble the broad powers and scope of a grand jury investigation?

The COURT: No, Mr. Moore. Unless you are prepared to concede what I have said to you several times, that you must show some materiality, I am going to grant this motion. If you can show me why you want the minutes and these other documents that have been objected to and if that furnishes a reason, then I will permit them to be brought forward by the subpoena duces tecum, but if you can't show any reason or any materiality, then I am going to grant the movant's request.

Mr. MOORE: Your honor, if that is your final decision, I will bow to it to this extent, that I think it is important that the grand jury have those documents.

The COURT: Let them ask for them and they will prob-

ably get them. We are talking now about your subpoena duces tecum, not theirs.

* * * * *

The COURT: I have told you what my position is on that and you have had plenty of time to prepare yourself if you had any grounds for asking for these particular documents.

I will sustain the motion. An order may be entered to that effect.

May 4, 1956, at 12:30 p. m.:

The COURT: I understand that the grand jury would like to make a report or some statement or ask a question of some kind, Mr. Hark?

Mr. HARK: Yes, sir. Your Honor, the grand jury would like to request that certain documents which have been subpoenaed and not brought in by several companies be further subpoenaed and brought before the grand jury.

The COURT: And what are they?

Mr. HARK: First, all minutes of meetings of the board of directors and executive committees of the company herein named for the period January 1, 1951, to May 1, 1956;

Second, the annual balance sheets and profit and loss statements, consolidated and unconsolidated, prepared in the course of business of the company herein named from January 1, 1951, to and including the most recent of such sheets and statements;

Third, such documents or lists prepared therefrom as will show the total annual sales of the company herein named during the period from January 1, 1951, to April

1, 1956, in quantity and dollar volume of (a) milk and (b) other dairy products;

Fourth, such additional documents or lists prepared therefrom as will disclose all prices, terms and conditions of the sale of milk and other dairy products in effect and charged by the company herein named at all times during the period from January 1, 1951, to the date of this subpoena, to the extent that such information is not disclosed by the documents produced in response to Item 11 of the previous subpoena duces tecum served upon Valley Bell Dairy;

Fifth, all annual reports submitted to the board of directors and stockholders or officials of the company herein named for the years January 1, 1951, to the date of this subpoena.

The COURT: Now Mr. Hark, is this the request of the grand jury on its own initiative or at the instance of the attorneys for the Government?

Mr. HARK: Your Honor, it is made by the grand jury in its own session.

The COURT: I mean of its own initiative?

Mr. HARK: It was initiated, yes, by the attorneys.

The COURT: What did the attorneys do?

Mr. HARK: The attorneys explained what had been requested and left the room and left it up to the grand jury to decide whether or not these documents should be produced.

The COURT: All right, I will consider that request and give counsel for the Valley Bell an opportunity to make a motion, if he so desires.

First, however, I would like to find out if any member or members of the grand jury are of opinion that this request represents a request of the Government attor-

neys without any explanation to the grand jury as to why the documents are asked for, or is it a considered request by the grand jury after knowing the reasons that the Government has for wanting the documents.

Now will the grand jurors, or any of them, answer that question? The reason I am asking you this question, gentlemen, is this:

I had told the attorneys for the Government that it is the grand jury's business whether to ask for documents or not to ask for them, and there has been a motion made to quash the request for these documents and there has been a refusal on the part of Government attorneys to give the Court any reason why the documents should be furnished.

Now, if the attorneys for the Government are simply using the grand jury as an indirect means of doing something that the Court has already ruled cannot be done, then I am not going to permit it; but if the grand jury itself, knowing of some reason why it wants documents, asks for the documents to be produced on its own initiative then that is an entirely different proposition. It is the grand jury that is making the investigation, not the Government attorneys. Their business is to show you what the evidence is from witnesses, persons and documents that are properly brought in.

Now I have ruled that these documents cannot be properly brought in by a subpoena from attorneys for the Government unless they are willing to tell me why. If they have told the grand jurors why, and if the grand jurors have been told why they want the documents, then I will proceed to consider the motion to quash in the light of that information, but I certainly do not countenance any attempt on the part of Govern-

ment attorneys to use this grand jury for purposes that the Court has told them they cannot use it for.

Mr. GORRELL: Judge Moore, I think the matter was put before the grand jury and the jurors voted for it. In my own mind I saw no evidence or was given no reason for requesting these particular documents.

The COURT: Mr. Hark, as foreman of the grand jury, did the attorneys for the Government give any reason to the grand jury based on any knowledge they have as to why they wanted these documents?

Mr. HARK: No, sir, they gave us no reason why they wanted them, and they left it up to the grand jury in its discussion to decide whether or not they wanted them, and they left the room and then after some discussion by the grand jury we voted overwhelmingly to have them produced.

The COURT: Does the grand jury feel from the vote of the grand jury and discussion in the grand jury that there are reasons for producing these documents? By that, I mean, as I have explained to the attorneys for the Government, that no grand jury or anybody else has the right to simply send out and get private records of companies just to satisfy their curiosity. If there is any reason at all to believe these private records may furnish some information of the commission of a criminal offense then they ought to be produced, but obviously if private records of any company were subject to being produced on just the whim of someone, or the gossip or rumors of someone that there may be something wrong with those records, why, then the rights of the citizen would be in danger and in jeopardy, and the very purpose of courts of justice is to prevent that.

Now I do not want to withhold anything from the grand jury that is a proper subject of inquiry by the grand jury; but on the other hand I do not want the grand jury to engage in prying into secrets of companies which have no relation to the scope of the inquiry they are conducting.

Now this could have been taken care of by counsel for the Government in the hearing we had this morning if counsel for the Government had been disposed to tell me of any reasons why the records that he wants are supposed to be material to the investigation. Counsel said that he was reluctant to tell me because he felt that he might violate his oath of secrecy, but obviously that could not be done because the oath of secrecy is conditioned that if a court in a judicial proceeding requires a disclosure that there is no longer any grounds for secrecy.

I will take this statement of the grand jury, which I understand now to be this, that no reasons were advanced by attorneys for the Government why or in what way these particular records would be material or relevant to the inquiry, but the Government simply requested the grand jury to ask the Court to bring these records in, and—

Mr. HARK: Not quite that way, Your Honor. They left it up to our discretion.

The COURT: Well, they asked the grand jury to consider whether these records should be brought in, without the grand jury being informed as to any relevancy or materiality that the records might have, I understand.

Mr. HARK: Yes, sir.

The COURT: Very well, I will take that under con-

sideration. If there is nothing further from any of the other grand jurors, you are now excused.

Gentlemen, before you are excused there is one question I had in mind to ask you which I did not ask Mr. Hark, and that is whether the statement Mr. Hark has read to the Court was written by the attorneys for the Government or was it written by the grand jury?

Mr. HARK: Your Honor, it was written by the attorneys for the Government.

The COURT: And was it written before you had your session or afterwards?

Mr. HARK: Before.

The COURT: All right, that will be all.

Mr. WEGER: Your Honor, as a member of the grand jury, if I may I would like to say that the considerations that were given to this paper which was read here were, at least in my opinion, based upon things which had been heard by the grand jury. That weighed our deliberations, at least, it did mine.

The COURT: Now is there any other statement that any member of the grand jury wishes to make?

Mr. ROTGIN: Your Honor, could we go back to the beginning when this was first presented to us this morning by the attorneys for the Government?

The COURT: You may make whatever statement you wish to make.

Mr. ROTGIN: The attorney for the Government brought up to us the different points that were suspended in subpoenaing certain documents, and in a number of instances the documents he referred to he wrote down the nature of the documents that were suspended and not brought in. He made it very clear to us because in one instance his opinion was asked as

to his feelings in the matter, and he refused to state because he felt it was not his prerogative to give any opinion and he made no pros or cons in the way of giving the jury any opinion or any instructions at all. He simply wrote those down for us to hear and know which documents had been suspended, because we didn't know which companies or we didn't know which particular documents had been suspended, and that is the list of the ones that had been in certain instances suspended, upon which he and his associates got up and left the room and told us definitely it was entirely our prerogative to decide this for ourselves.

The COURT: All right, now does anyone else wish to be heard?

(Whereupon Mr. Hark, the foreman, spoke to the Court out of the hearing of the other grand jurors, and the reporter.)

The COURT: Some mention was made just now of a recess of two weeks. Now I want the grand jury to understand this with reference to any recess: The grand jurors are at entire liberty to be in session or in recess just as they please. I do not have anything to do with that but neither do the attorneys for the Government have anything to do with it and it is not their business for the grand jury to recess. I am a little bit concerned as to whether this grand jury is operating on its own initiative or whether it is operating by some program put before it by the attorneys for the Government.

Mr. Hark, did the grand jury of its own initiative vote to recess for two weeks?

Mr. HARK: Yes, sir, after the attorneys explained

they had this mass of evidence to go over and it would take several weeks to do so.

The COURT: Call in counsel for the Government, please.

Mr. PICKERING: I am right here, Your Honor.

The COURT: I explained very clearly to the counsel for the Government that it is the grand jury that is to consider the evidence. If the grand jury recesses all the evidence that is before the grand jury is going to be impounded and nobody is going to see it. I am a little bit indignant that counsel for the Government would undertake, after knowing clearly what the Court has said as to what the duties of the grand jury are, and as to the limitation and extent of its duties, that they would undertake to circumvent what the Court has said.

It is the grand jury that is looking at this evidence. It is your responsibility. It is not the responsibility of counsel for the Government. I told you in the beginning that the only reason the Government has brought this case before the grand jury rather than by information is because they could not get these documents by a subpoena returnable before themselves. There is no such provision in any law. The only provision is that documents are returned for the inspection of the grand jury. I am not going to permit counsel for the Government to take these documents and if you have a recess for two weeks they will just have to wait and come back to the same situation they are in now.

Mr. PICKERING: Your Honor, it is not the intention of the Government to take the documents anywhere. We are going to stay in the grand jury room and, I understand from what the Court told us before, we would be permitted to look at those documents.

The COURT: Before the grand jury, right in the presence of the grand jury.

Mr. PICKERING: Your Honor, we have been looking at them and there is a great mass of documents. If we were to examine all those documents in the presence of the grand jury then the grand jury would have to sit there idle for a week or two. We have been examining those documents, to be frank about it, in the evening, in the grand jury room, and this is according to precedent that has been in existence for fifty years and with the approval of the Attorney General of the United States.

We feel there is nothing improper about it. We feel we have done nothing to circumvent what the Court previously told us, and I think we have made every effort to present matters and questions for the grand jury to decide, such as were presented to it this morning. We have hesitated—we have refused to give our opinion or any argument to the grand jury as to why we want certain things done. They have asked us questions and we have answered to the best of our ability, but we have refused to give our reasons for certain things or argue why certain things should be done.

I understand that Rule 6 (E) or (D) of the Rules of Criminal Procedure provides that attorneys for the United States shall have disclosure of all evidence brought before a grand jury except the nature of their deliberations and their votes, and that disclosure includes testimony and documents.

The Government cannot possibly perform its functions in participating in this type of investigation without having access to all documents, and if the grand jury is to be required to sit for all the period of time required to read through three file drawers full of documents, I don't know what will happen.

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I repeat, Your Honor, the Government attorneys have done nothing, at least we think we have done nothing at all to circumvent any instructions this Court laid down in this matter. We have tried to the best of our abilities to follow the Court's instructions although, as we said at the time, we thought that the Court's instructions were much too stringent in this type investigation.

We would like to have time to present a memorandum to the Court, if he wishes, showing authority for our position in this matter.

I would like to make one further statement, Your Honor, with reference to examining documents. If we can examine the documents in the presence of the grand jury, and if we can remember what is in the documents, and perhaps take notes of what is in the documents, nobody's rights are infringed by our examining these documents when the grand jury is not in the room. They have been brought in under lawful subpoenas [sic] and are in the custody of the grand jury in the grand jury room, and the grand jury has access to these documents at all times.

The COURT: The documents are brought in simply that the grand jury may consider whatever evidence is contained in the documents. The documents are not brought in for the purpose of being inspected by either counsel for the Government or any other counsel and an analysis made of them and a case built up. If there is any incrimination in documents then the Government ought to be able to point it out while the grand jury is in session. If there was any other method of procuring evidence of that kind for the Government without the grand jury being present I think it would have been provided for by law, but there is no such provision in the law.

The only provision in the law is that the grand jury itself may inquire freely. Now if the grand jury wants to employ some attorney to make an analysis of the documents, perhaps that might be done, but then the attorney would be an attorney for a judicial branch of the Government.

It seems to me that there has been a great lack here of a proper perception of the fact that when the grand jury is in session it is part of the judicial branch. These attorneys who are with you in the session are part of the executive branch. Your duties are not the same. The executive branch is a prosecuting branch. The judicial branch must do nothing except look at evidence, and, in connection with the inquisitorial powers of the grand jury, search for evidence and then make up its mind as to what to do after the evidence is found.

As I say, you have made your statement to me and the matter is before the Court and the attorney for the Valley Bell Dairy Company, which is the corporation concerned, will be given the opportunity to renew his motion, if he cares to do so, and then it will be reconsidered in the light of all the grand jury has said; but I want the grand jury to know what I have said to you, that you are the ones to govern your own deliberations as to when you shall have them and as to what you shall consider when you are in session, and you are not to regard yourselves as merely an appendage of the Government attorneys, who are here to present matters to you.

Now I do not know of anything else that needs to be said at this time.

Mr. PICKERING: Your Honor, I do not know whether it should be brought up at this time or not, but the Court mentioned impounding the documents while the grand

jury is in recess. Do I understand that there is to be a Court order, that while the grand jury is in recess for a period of days the attorneys for the Government will not be permitted to examine these documents, or is that a matter which the Court would like to reserve for decision?

The COURT: I might express it in this way, that it would be my opinion that the owners of these documents are entitled to have them back at any time the grand jury is not in session, and therefore if they want the documents back I believe they could have them. If they make no objection, of course, there would be no point in making any decision on that.

Mr. PICKERING: If the owners of the documents claimed them while the grand jury were in recess they would still be under subpoena and they would be required, then, to return the documents when the grand jury returns; is that the Court's understanding?

The COURT: Well, I had not thought of that but you are probably right about that. The grand jury, of course, would not have to look at voluminous documents all at once.

May 9, 1956:

The COURT: I have asked Mr. Pickering and Mr. Moore to come into court for the purpose of getting some information from them with reference to the records and documents that are before the grand jury. Gentlemen, where are the records and documents that have been subpoenaed before the grand jury?

Mr. PICKERING: The records and documents are in a locked filing cabinet in the grand jury room.

The COURT: Who has the key?

Mr. PICKERING: I have a key.

The COURT: You will turn the key over to the clerk.

(The key was handed to the clerk)

The COURT: Are there any other keys that you know of?

Mr. PICKERING: Not unless Mr. Ehle has one.

The COURT: And I will instruct you not to get another key. The records, as you know from what the court has already said, are records of the grand jury and you have no more right to a key to the file containing their records than anyone else has.

You gentlemen may think that it is strange that the court has emphasized to such a degree the idea that you and the grand jury are in different departments and have different functions. The reason why I have done that is because I believe that the separation of the judicial and executive powers is one of the most important guarantees to individual liberty that exist in our governmental system, and whenever it appears that the executive branch or anybody from the executive branch is undertaking to use the judicial branch for purposes that belong exclusively to the executive branch, then I believe it is my duty to prevent that from happening.

I said to counsel the other day just as plain as I could put it into words that I take the position that the grand jury and the grand jury alone are entitled to whatever records are subpoenaed and to whatever records are made before the grand jury, at least prior to an indictment, and whether they should furnish you with transcripts after an indictment is a question that I will take up when the time comes to take it up.

You gentlemen may feel differently about that, but it is my belief as a judicial officer that if you do feel differently about it that your only remedy is to apply to some judge that has the right to disturb my decision, and I am not going to permit you to go ahead and violate any orders that I give you with reference to the grand jury.

It is an arm of the court and the court has discretion as to when it should be convened and how long it shall serve and I take it as to what goes on with reference to attorneys who appear before it. I want to caution you gentlemen to follow what the court has said is the limit of your activities in connection with the grand jury, and so long as you do, then I will have no objection to your activities; but if you transgress that, then I am going to take steps to stop you and if you want to have any remedy you have it by appeal.

Mr. MOORE: Is it our understanding, your honor, that this is now an order of the court that we are not to examine documents in the absence of the grand jury?

The COURT: I have already told you that.

May 11, 1956:

The COURT: Mr. Pickering has spoken to me about a question that he wishes to bring up with reference to a transcript of proceedings that have taken place so far before the grand jury. I don't know whether you gentlemen are interested in that or not, but I have told Mr. Pickering that anything connected with this matter in view of the past history of it will have to be taken up in open court.

Mr. PICKERING: In that case, your honor, I understand from Mr. Stevenson, who was retained by the De-

partment of Justice to transcribe the testimony before the grand jury, that you instructed him to advise counsel for the Government to consult with you before accepting delivery of any copies of that transcript. We have been busy in other matters. We haven't had time —we wouldn't have had time to even look at the transcript if we had had it, so the matter hasn't come up.

However, for the purpose of advising my superiors, I would like to know if the court wants to take any particular position with respect to that transcript.

Before that, I might point out that the Government's position as far as I know, and this is based on my experience and what I understand is the practice not only in antitrust cases but in all cases before grand juries where transcript is taken, that the transcript is the property of the Department of Justice, and that the transcript is delivered directly to attorneys for the Government.

It is delivered directly to the attorneys for the Government by the contract reporters or the employees of the Department of Justice when it is prepared, and that counsel for the Government may use that transcript in the performance of their duties. As a matter of practice we never disclose the contents of that transcript to any unauthorized person, and we even maintain a safe in our regional office in Cleveland as repository for transcripts of grand jury testimony to make certain that it does not fall into the hands of unauthorized persons.

That, briefly, is the Government's position with respect to transcripts, as I understand it.

The COURT: I can see many reasons that may be offered why the Government should have a transcript of

testimony before the grand jury as to some particular person after an indictment has been returned by the grand jury against that person. Before indictment I know of no reason why the attorneys should have a copy of the testimony to take away from the grand jury with them any more than they are entitled to have the documents that are brought in under subpoena.

Both the documents and the transcript represent evidence which is presented before the grand jury. As I interpret the provision of the rule with reference to disclosure, disclosure to attorneys for the Government means disclosure for the purpose of enabling them to perform their duties in the investigation that is going on before the grand jury and does not reach so far as to give them copies of statements that may have been made that don't lead to any indictment.

You can very easily visualize how statements of that kind, even though only in the possession of counsel for the Government, might be extremely damaging to somebody who [sic] the grand jury has not seen fit to indict, and such persons are entitled to full protection with reference to anything that may have gone on before the grand jury.

On the other hand, where testimony is voluminous it is also natural, I think, that the grand jury may want to be refreshed as to what some former witness may have said; and for that reason it is entirely proper that transcripts be made and be available to Government counsel while the grand jury are in session and before the grand jury, but as to taking away transcripts from the grand jury room and making them private property of the Government prior to indictment, I don't believe that there is any rule that requires that and I don't think that it is in the interest of justice.

After the indictment is returned, if there is an indictment returned, I will then listen to whatever arguments there may be that the transcript should be delivered over to attorneys for the Government.

* * * * *

The COURT: Let me ask you this: what benefit is it to counsel for the Government to have a transcript of the proceedings if there is no indictment?

Mr. PICKERING: Your honor, I think it is a benefit both to the Government and to any persons who may be under investigation by the grand jury that the Government have a copy of the transcript as well as access to documents, for this reason: that in order for the grand jury to take action the Government attorneys present the grand jury with a prepared indictment. The grand jury then deliberates whether it wishes to indict or not. It may or may not indict.

However, in the preparation of that indictment the attorneys for the Government can do much more accurate work and better work. They can work much more conscientiously if they have before them an accurate and complete record of everything that took place before that grand jury rather than having to rely on their memory and such notes as they might have been able to take down hurriedly.

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The COURT: I don't think it would be contended that the court is without any discretion with reference to a stenographer. Even though the grand jury does have complete power within its sphere, it is my belief that the court must exercise sound discretion as to the activities of the grand jury with reference to how they

are conducted and that the court would have discretion to say whether a stenographer should be permitted in the grand jury room or not.

If a court has discretion to say whether there shall actually be a stenographer or not, then it would be very odd indeed if the court didn't have discretion to say what would be done with the stenographer's notes; and as I said, the grand jury itself always has complete access as a grand jury to whatever is before it.

The attorneys for the Government have complete disclosure of everything that's before the grand jury for the purpose of enabling them to perform their duties, and if it is necessary to have a transcript of the evidence for the purpose of drawing an indictment the evidence can be transcribed and the indictment can be drawn in the presence of the grand jury.

* * * * *

Mr. PICKERING: * * * However, if no indictments are returned and we had access to the transcript, no one has been injured. No one has been indicted and there would be no further cause for any dispute or disagreement.

The COURT: And no reason for the Government to have any transcript.

Mr. PICKERING: Except for the fact, your honor, that that transcript is the property of the Department of Justice and that, I understand, is the position taken by the Attorney General, and I am instructed to urge that position earnestly and vigorously. The transcript is the property of the Department of Justice and we have the right to have that transcript at all times.

However, I see no reason why the court would have

to order us to make that available to the grand jury, because we would. We always have. As a matter of practice, I have never known the grand jury to want to go back and read the large volumes of testimony that are usually produced in the course of these investigations. However, on the point of the right of the Government to have that transcript, our position is based on the ground that it is the property of the Department of Justice.

May 18, 1956:

The COURT: We have set this morning for a further hearing in the matter of request made by the grand jury, which is now sitting, as I understand, for the production of certain documents which were heretofore the subject of subpoena duces tecum procured by attorneys for the government and which were the object of a former hearing at which the court sustained a motion by counsel for Valley Bell Dairy Company to quash the subpoena duces tecum as to these particular documents on the ground that there was no showing by the attorneys for the government that they were material to the grand jury's investigation.

I stated after the grand jury had made its request that opportunity would be given to counsel for Valley Bell or any other interested counsel to renew the motion in view of the further developments, if they cared to do so, and this hearing is to find out whether the motion is to be renewed and, if so, what the argument is now pro and con.

Mr. CASTO: If the court please, it is our desire to renew our motion as to this request. (Handing paper to the court)

Mr. MOORE: Well, I will say this. Mr. Casto has pointed out, I believe, in his statement here that the grand jury could have no reasons for desiring those documents. Perhaps I misquoted him. If I have misquoted him I would certainly appreciate it if he would correct me.

I just want to point out to the court on page nine of the transcript of the proceedings where the grand jury appeared here one of the grand jurors, Mr. Weger—and I quote—said, "Your honor, as a member of the grand jury, if I may I would like to say that the considerations that were given to this paper which was read here were, at least in my opinion, based upon things which had been heard by the grand jury. That weighed our deliberations, at least it did mine."

I don't know why the grand jury decided that they wanted these documents. In all honesty as an officer of this court I do not know why or on what reasons they based their decision to ask for these documents but it may have been that they felt—I don't know—it may have been that they felt that the documents requested appeared on their face by the nature of the request, such as minutes of annual meetings and reports to the board of directors and what not, that these items when they are investigating the business practices of a company, on their face would appear to be the likely source of information.

The COURT: Is that what this grand jury is doing, just investigating business practices?

Mr. MOORE: In a sense, to determine whether there was a violation of the statute.

The COURT: If that's all they are doing, Mr. Moore, you might as well bring them down because I am not

going to let them stay in session just to let them investigate business practices of any company.

Mr. MOORE: To determine whether its transactions violate the antitrust laws.

The COURT: If they are investigating criminal acts, then they are doing what they are supposed to do and that's all.

Mr. MOORE: The Sherman Act is a criminal statute which charges a crime to have been committed if certain business practices are taken by certain companies.

The COURT: That's not the way I interpret the Sherman Act. The Sherman Act makes a conspiracy to restrain trade criminal. The Sherman Act says nothing about any business practices.

Mr. MOORE: To this extent, your honor, that it says that any contract, combination or conspiracy in restraint of trade or commerce among the several states shall be illegal. A contract may be an illegal contract. It may be a legal contract, but it is a contract. It is a method of doing business, and when I said business practices I meant in the broad sense that those practices may or may not be a violation of the Sherman Act if they amount to restraint of trade or commerce either by contract, combination or conspiracy. It is a criminal statute and if the contract between individuals, whether oral or written, is an illegal contract, then it would violate the statute.

The COURT: There is no question about that, but that doesn't give a grand jury the right to start in an investigation and simply summon the entire files of any particular business in the prospect or possibility that by investigating its files something may be found in the contracts which is illegal.

There must be as a basis for any such investigation some evidence already procured by the government or by the grand jury which tends to show the illegal act and which makes the documents relevant. I have repeatedly said to you that if you will point out any such evidence that I will be glad to consider it, and you have said in a former hearing that you were reluctant to do that because you feared you might violate your oath of secrecy, and I think that if you have taken the time to consider that you will conclude that there is nothing whatsoever to that contention, because the rule itself is to the effect that the secrecy of the grand jury proceedings may be inquired into in any court proceeding. This is a court proceeding and it is a very essential court proceeding to the grand jury's investigation and there is nothing in connection with the secrecy of the grand jury that will prevent you from showing to the court, if you have it, to show what foundation there may be for the request to bring in these documents. That's a very simple thing and that's all that is involved here.

Mr. MOORE: Obviously the grand jury cannot know in advance whether a given set of documents will or will not contain evidence. If the grand jury had requested a set of documents relating to a totally unrelated segment of Valley Bell's business, I would say that materiality would then be in issue.

* * * * *

The COURT: Well, I would like to have you say whether you are still refusing to give reasons because you regard your oath of secrecy as preventing it.

Mr. MOORE: I think that perhaps we are discussing something different here now in that the grand jury came down and asked for these and what reasons they might have had might be entirely different from the ones I could give. Maybe they don't have any reasons. I don't know, but we acted in good faith.

The COURT: If they don't have any reason, then it is subject to quash just the same as if you don't have.

Mr. MOORE: I am saying I don't know whether they did or not because we never inquired. I would say with respect to corporate documents in which minutes were taken of meetings that if prices have been fixed in this industry, discussions amongst the corporate directors as to when they are going to increase their prices or when they are going to decrease them would certainly be material.

The COURT: Well now, what do you have as a fact to advance here to lead you to believe that prices have been fixed and that these documents will show that?

Mr. MOORE: I would have to revert back to my original position on that, your honor. I don't want to disclose the evidence. I would prefer to lose the documents in the subpoena.

The COURT: You mean your original position is you refuse to give any reasons. Is that it?

Mr. MOORE: Other than the reason that at least in our opinion on the face of these documents they would appear to be material to a grand jury investigation of whether there has been a violation of the Sherman Act. If there were requests which were totally foreign to that, then I would say some statement as to materiality should be given but we believe that the requests right on their face appear to be the type of document that

would provide the information the grand jury is attempting to find out.

* * * * *

The COURT: The grand jury may have made the request but you are the one that wants it and if you haven't any reason——

Mr. MOORE: Apparently they want it too.

The COURT: Well now, Mr. Moore, you know and I might as well tell you right out that that was just an attempt to circumvent the order of the court.

Mr. MOORE: I have to disagree, your honor. We have no intention of circumventing the court's order.

The COURT: You don't convince me of anything you say. I went into that with the grand jury just as thoroughly as I could go into it and I am going to approach this as if it is still the attorneys for the government asking for the documents. If you want them and if you want to give me some reason why they are pertinent and if I think that reason is a good reason, then I will let these documents be brought to the grand jury.

* * * * *

The COURT: And I will tell you once more if you have any reason give it to me and if you haven't I will pass on this motion.

Mr. MOORE: I have no other reason, your honor.

The COURT: All right. The motion is sustained.

May 24, 1956:

The COURT: Mr. Hark, as foreman of the grand jury, I was informed that the grand jury has some statement to make to the court.

Mr. HARK: Yes, sir.

The COURT: All right. You may speak for the grand jury.

Mr. HARK: Your honor, we the grand jury have decided to recess after today's session until September 10th, 1956, at which time we will consider the evidence from its transcript and call for further evidence if necessary.

The COURT: What do you mean by consider the evidence from the transcript?

Mr. HARK: Well, there has been about forty-five witnesses and the jury does not feel that it can consider all the evidence—there has been such a mass of it—unless we have the transcript to go over.

The COURT: Do you mean that the jury want the transcript, all of the evidence read back to it?

Mr. HARK: No, sir, just to consider different phases of the evidence.

The COURT: Well, then, how is the jury going to consider it if it is not read back to it?

Mr. HARK: Well, as I understand it, it depends entirely on who is—the transcript as to its digest. That's what I really mean.

The COURT: Do you mean that you want the Government attorneys to prepare a digest of this transcript?

Mr. HARK: If that's in order, Judge, that's what we want.

The COURT: And then the grand jury doesn't want to go over the whole transcript. Is that correct?

Mr. HARK: Yes, sir, we want a digest.

The COURT: Well gentlemen, I will say this. A recess of a grand jury in its consideration of a particular subject matter, a recess of several months is certainly not

consistent with fairness to those persons whose activities have been under consideration.

You have now been in session I think for all of this month. I believe you came in about April the 30th and it is now May the 24th. Any action that you may take would certainly be indicated now to your minds much better than it would if you would recess for June, July, August, September—nearly four months—and then come back, and I do not believe it is consistent with fairness to any defendants that are under investigation that you do that; so I am not going to permit you to recess until September the 15th.

If you wish to consider to continue your sessions so long as I am in the district, which will be for another ten days, then I shall be very glad as a court to permit you to continue your sessions if you believe that they are profitable, but I do not believe that you can possibly deal fairly with any question before you if you take a four months' recess; so you may go ahead on that basis. I will excuse the grand jury.

(The grand jury left the courtroom.)

The COURT: I will say to Mr. Pickering and Mr. Moore Mr. Stevenson has shown me a letter which he has received from Mr. Stanley N. Barnes, Assistant Attorney General. He is requested by this letter to deliver to you two gentlemen all copies of transcript of testimony taken before the grand jury.

Mr. Stevenson is ordered not to deliver transcripts of the testimony to anybody until the further order of the court.

Mr. Pickering and Mr. Moore are ordered as attorneys of this court not to attempt to procure any transcript of that testimony until the court has considered the brief, that I have now been furnished with, and

has reached a conclusion as to whether they are entitled to it or not.

May 29, 1956, at 11:15 a.m.:

The COURT: Gentlemen, the marshal informs me that the grand jury would like to say something to the court, so if that's true you may speak through your foreman, or any individual member of the grand jury, of course, if you have anything to say you may speak up and say it.

Mr. HARK: Your honor, the grand jury has adopted this resolution: The grand jury takes the position that it has nothing further to investigate at this time. The jury believes that it is not prepared to consider any indictments at this time and none have been presented. We now await further instructions from the court.

The COURT: What is the situation with reference to the transcript, Mr. Pickering and Mr. Moore? Has there been any transcript of the proceedings made?

Mr. PICKERING: No, your honor, there has been no transcript delivered. We understand it will be approximately two to three weeks before the complete transcript could be delivered and also we have been instructed not to accept delivery at this time until our superiors have had time to consider the court's order relating to that transcript.

We have nothing further to call to the grand jury's attention, your honor, and I believe perhaps we have explained earlier the Department's procedure with respect to these matters. The decision as to whether any indictments are to be presented to the grand jury by the Department must be made by our superiors, by the Assistant Attorney General, sometimes the Attorney General himself.

If the Department wishes to present proposed indict-

ments to the grand jury for its consideration, it needs time—the Department needs time to examine the transcript, prepare such indictments and to give our superiors full opportunity to consider the proposed indictments before they are given to the grand jury.

The COURT: Mr. Hark, may I look at your resolution? I want to know exactly what it is the grand jury says.

(Paper handed to the court.)

The COURT: In this resolution it is stated that the jury believes that it is not prepared to consider any indictments at this time and none have been presented. As I told you, I believe, in the general instructions at the beginning of your service, it is the responsibility of the grand jury as to whether or not to return any indictments.

You say that no indictments have been presented, and by that I take it you mean formal indictments prepared by the representatives of the government, but you have been investigating the subject for which you were called about a month and it should be apparent to you by this time whether evidence has been presented which will justify indictments.

It is true that the government would prepare whatever indictments you gentlemen decide that you want to vote as true bills, but your action is to be based on the evidence that has been presented to you and not upon any indictments—I mean not upon any formal written papers that the government may present to you.

It is my suggestion to you that you meet in executive session and decide whether or not from the evidence that's been presented to you you believe that any true

bills, that is, indictments, should be voted; and if you decide that you believe that certain true bills should be voted and if you vote that certain indictments should be found against certain persons or corporations, then the court will give the government time to frame those indictments and bring them to you in an adjourned session.

If, on the other hand, you believe that the evidence that's before you is not sufficient for you to vote any indictment against any person or corporation, then you should take action to the effect that there is no evidence justifying any indictment or true bill against any person or corporation. In other words, if I haven't already made it clear to you, I believe that you have been in session as long as it is necessary for you to be in session in order to determine whether or not it is proper and in the interest of justice that indictments be returned by you.

You have all the evidence which until now has been presented to you. If it is enough to justify indictments, go ahead and vote that way. If it isn't enough to justify indictments, then vote that it's not; and if you come back to me and say that you have voted that certain indictments should be found against certain persons or corporations I will be willing, if you so desire, that that vote be sealed and kept secret until the government shall have had an opportunity to prepare indictments against those persons, formal indictments for your foreman to sign. But if you decide that you do not have enough evidence before you to return indictments, then I will discharge you.

Mr. HARK: Your honor, we have polled the opinion of the jury and this seems to be our way of doing this.

The complexity of the situation is such that they feel—and I think you could ask several of them their opinion on it—that they just can't indict or be sure of an indictment.

The COURT: Well, they could at least vote that there should be no true bills returned.

Mr. HARK: Yes, sir, we attempted to do that.

The COURT: That's not exactly what you say by this resolution.

Mr. HARK: That's the resolution that the jury passed finally but we had several others.

The COURT: You say in the resolution you are not prepared to consider any indictments. What you say to me orally indicates that you have considered indictments and you have decided that none should be found, so I would like to be advised as to just what your conclusion is.

Mr. ROTGIN: Before we prepared that statement we called for a vote—may I speak freely?

The COURT: Yes, sir.

Mr. ROTGIN: We called for a vote as to whether or not we wished to continue the investigation pending receipt of necessary papers that were to be prepared in due time or whether we should call a halt to it now. Our vote in that respect only was that we should continue.

The COURT: Gentlemen, you I think can understand the motive of the court in saying that you must take action of some kind at this time. If you should just stand on this resolution that you are not prepared to consider any indictments and if I, thinking that you have had plenty of time, should discharge you, then since it is publicly known that you have been conducting an investigation of the dairy business, every person who

is in that business in this whole locality would remain under suspicion for an indefinite time or maybe permanently.

They are entitled either to have charges made against them by means of indictments of the grand jury or to have this grand jury say that they are not going to find any true bills. I think that the grand jury owes it to these people to take some action one way or the other.

Go ahead, sir.

Mr. WEGER: It is my feeling that the complexity of the case or of the evidence which has been presented before the grand jury is such that it is virtually impossible for the grand jury to consider individual indictments at this time until such framework of the law can be spelled out in formal indictments. For me to attempt from my memory of the mass of evidence which I have heard to honestly evaluate it, I don't feel that I can do it. I feel that if I attempted to do it I would run the risk of doing injustice to the public or to the people whose industry we have investigated. That is the reason that I favored the resolution as presented, that we might have something which we might formally consider which we could honestly evaluate specifically.

The COURT: The indictment could not go any further than the law. The court has explained to you the meaning of the statute. You have heard the facts. The statute is very simple. It requires that the facts show you, at least prima facie, that there has been a conspiracy in restraint of trade or that there has been a monopoly or attempted monopoly.

If the facts are complex, there is nothing that anyone can do about that. The government attorneys are not permitted to make a digest of these facts and tell you

"here are the essential facts and you needn't consider any others" because it is the duty of the grand jury to consider all the evidence. That's why the other day when you requested some time to have the government attorneys make a digest of the evidence I refused to permit that because obviously if the government attorneys made a digest of the evidence, then what they presented to you finally would not be the evidence that you gentlemen heard but it would be their opinion of what the important part of that evidence was, whereas you gentlemen as a grand jury are required by your oath to consider all the evidence and there is no way that anybody else can make a digest of it and furnish it to you.

The only thing that the government attorneys can do in any recess would be to frame formal indictments and these indictments would necessarily charge in connection with the investigation that you have been making either that certain persons entered into a conspiracy in restraint of trade or that certain persons monopolized or attempted to monopolize the dairy business in this vicinity.

It is not a complex law. It is just a question of applying the facts to the law, and you will never be in any better position unless you have more evidence presented to you than you are today to say whether the facts in your opinion justify an indictment for violation of one or the other of those satutes.

Mr. ROTGIN: Your honor, will we as grand jurymen be able to have access to the complete testimony that has been given before we make our decision, should we adjourn?

The COURT: I said some time ago that if the grand jury wishes to have this evidence transcribed and read

to it that that's perfectly all right, but I am not going to permit government attorneys to have access to it while it is being transcribed and before it is read.

Mr. WEGER: Your honor, in our first meetings of this grand jury when we considered matters brought before us on April 10th or 11th formal written indictments were presented, digests of evidence were presented by attorneys for the government in relatively simple cases, and it was very easy for us then to reach a decision to return a true bill or not to return a true bill, and I think that is the sort of thing that I have in mind. It would make it much simpler for me as a grand juror to discharge my duties if I had that sort of thing available to me to consider.

The COURT: Did you say government attorneys presented digests of evidence?

Mr. WEGER: No, I am sorry. They presented evidence which they had.

The COURT: Yes, that's entirely proper.

Mr. WEGER: Yes. I am sorry.

The COURT: This is no different from any other case, gentlemen, and you are not to apply any different standards to it from any other case.

Mr. WEGER: It is my feeling that I am trying to apply the same standards to this case, your honor.

The COURT: Well, you say in this resolution that you await further instructions from the court and I have given you my instructions, which are that if you wish to take a vote on whether or not you should return indictments, I will give you the opportunity to do that. If you feel that you don't want to take any more votes, then I will discharge you.

* * * * *

Mr. TREANOR: Your honor, it is my understanding that the grand jury believes that the evidence that has been presented here in this case is such that it warrants further investigation, but at the same time the grand jury has nothing further to investigate at this time.

The COURT: The grand jury is not to find an indictment upon evidence which simply is sufficient to warrant further investigation. That's not enough to justify the returning of an indictment. Evidence to justify the returning of an indictment need not be absolute or convincing in the sense that it is in the trial of a case but it should be evidence which causes the grand jurors to believe prima facie, that is, on the face of it, that certain persons or corporations are guilty of a crime.

If the evidence that has been presented to you is enough to cause you to believe that of any person or corporation, then it is very simple that you vote that that person or corporation should be indicted, and I have already told you that as to the formal indictment I am perfectly willing that you go into recess and let the government have all the time it needs to prepare any such formal indictments, but the responsibility for whether or not to indict is yours. It is not the government's, and you should be willing to say we will indict or we will not indict. If you don't want to do that, as I say. I am going to discharge you, but if you want to do that I am going to give you the opportunity to do it.

Mr. Hark, do you feel you can speak for the grand jury on that or would you have to have further consultation?

Mr. HARK: I expect we would have to have a further meeting and, Judge, would you clarify, if we vote for

an indictment would that have to be specific against certain persons or corporations?

The COURT: Yes.

Mr. HARK: We have to mention the particular person?

The COURT: That's right, but you do not need to say now exactly what the indictment is. I will permit you at this time to seal up that vote so that it will be revealed to the government as to whom the grand jury has voted to indict, and then they will be permitted to prepare those indictments and bring them back for the grand jury to meet and sign but, of course, if you just simply made a blanket indictment, not naming names, you would be in the same position you are now.

When do you want to see the court again?

Mr. HARK: Would the court be available about 2:00 o'clock, sir?

The COURT: Yes.

Mr. HARK: I think we can adjourn until about 1:00 o'clock and see the court at 2:00.

Mr. PICKERING: Your honor, may I ask a question? The alternative of the grand jury's naming persons to be indicted at this time would be for the grand jury to state that they did not believe anyone should be indicted?

The COURT: That's right.

Mr. PICKERING: And then the court stated it would discharge the grand jury. Did the court mean that the grand jury's service would be terminated altogether or that they would be subject to call again in the event the Department has further matters to call to their attention?

The COURT: This grand jury will remain the grand jury of this court until November.

May 29, 1956, at 2:20 p.m.:

The COURT: Mr. Hark, what have the grand jury decided, if anything?

Mr. HARK: Your honor, we the grand jury have resolved to act on the court's instruction, that if it did not want to vote on the question of indictment at this time to so inform the court and the court would discharge the jury. We have so decided.

The COURT: I suppose that I have probably said enough to the grand jury. I don't believe that the action the grand jury has taken will result in absolute fairness to all parties concerned because, as I have said, I think they ought to be either absolved by refusal to find a true bill or they should be given the opportunity to meet whatever charges are made against them.

However, since the grand jury have arrived at this decision, I am going to excuse you now and you will not be required to come into session again unless you are called by the court, and I do want to express the thanks of the court to all of you gentlemen. I realize that it has been at a great deal of personal sacrifice to yourselves and your businesses that you have come here day after day for about a month to conduct this investigation and for that reason I think you are entitled to a good deal of credit and certainly to the thanks of the court.

You will remain the grand jury of the court until the court calls another grand jury in connection with the November term but you will not be required nor per-

mitted to have any further sessions unless you are called in by the court, so you are now excused and you may claim attendance at the clerk's office.

Is the stenographer present, Mr. Stevenson? Where is Mr. Stevenson?

Mr. MOORE: I imagine he is in his office.

The CLERK: I happened to see him at the lunch hour. He is in Circuit Court today.

The COURT: I suppose that this can be conveyed to Mr. Stevenson. Mr. Stevenson, the stenographer who has taken down the minutes, is required now to deliver his notes to the clerk of the court and such notes as have been taken by the official court reporter will also be delivered to the clerk of the court and they will be held by the clerk and not transcribed.

Mr. PICKERING: Those notes will be held, will they not? They will not be destroyed?

The COURT: They will be held but not transcribed.

Mr. PICKERING: And will they be sealed, your honor?

The COURT: I think they should be sealed, yes.

June 1, 1956, at 10:20 a.m.:

The COURT: Mr. Pickering and Mr. Moore, do you have something to present?

Mr. PICKERING: Your honor, this morning we would like to present to the court three proposed orders relating to matters which have come up during the recent grand jury investigation. From time to time during the progress of this investigation the court has issued certain directions to the attorneys for the government with respect to their conduct of the investigation and these proposed orders attempt to reduce in concise lan-

guage in one place the contents of these various directions the court has issued.

* * * * *

The COURT: I have no doubt that Mr. Pickering in drafting these orders has attempted to outline exactly and precisely just what the actions were and rulings of the court from time to time in connection with the grand jury which has recently been in session.

However, in order that the records in the clerk's office may reflect exactly what occurred I believe that the only proper way to proceed by formal order is simply that an order be entered which incorporates the exact transcript of the proceedings that have been had in open court. Then if Mr. Pickering or Mr. Moore wish to make any motions with reference to what has occurred or what may occur today they may make these motions and the court will act on those motions in view of the proceedings that have already been had in court.

It must be noted here that the court's action on these various matters will be modified in many respects now in view of the fact that the grand jury have been excused from further consideration of testimony of witnesses in this investigation. Order number one presented by Mr. Pickering has to do with photostating of documents. It was my view and it is still my view that while the grand jury were in session all consideration of documents in the investigation and inspection of documents must be made by the grand jury or by government attorneys in the presence of the grand jury.

Since these documents have been inspected by the grand jury they now in my opinion fall into the same class as the transcript, which either has been or will be

or may be made by the stenographer who was present to take down the evidence, so that I am willing to authorize photostats of the documents that were produced under the subpoenas duces tecum to be used in the same limited way as the transcript.

Mr. PICKERING: Your honor, would your present ruling with respect to photostats also apply to the original documents?

The COURT: In my opinion the original documents belong to the persons that furnished them and they are entitled to have them back after a reasonable opportunity for the government to make photostats for the limited use that I have spoken of.

The next order has to do with a situation that arose during the session of the grand jury which was fully explored in open court and a ruling was there made and, of course, was applicable only at a time when the grand jury was in session. I take it now that what I have said with reference to the making of photostats and their use in a limited way would cover the substance of the second order which is presented. Am I right, Mr. Pickering, or is there some distinction?

Mr. PICKERING: Well, your honor, order number two was only intended to be a reduction to relatively few words of the order which the court had heretofore entered with respect to that. Of course, we understand that with the grand jury excused that this may be a moot question, but we are only interested in reducing to an order what the court had said prior to the jury's being excused with respect to our access to those documents. As to the court's statement on the similarity between our use of the documents and the examination

of photostatic copies of the documents, I see no difference in substance between the two.

The COURT: I think it should be confirmed here that it was in a chambers conference that the matter of making photostats of documents was brought up and therefore that matter will not appear previously on the transcript of open court proceedings.

Mr. MOORE: Your honor, might I ask a question? The subject of the use of the photostats, if I understood the court correctly, was that that would fall into the same category as the limited use of the transcript. Did I understand that correctly?

The COURT: Correct.

Mr. MOORE: I wonder, so that we understand thoroughly, if the court would outline those limitations for us.

The COURT: That's what I propose to do now. With reference to the third proposed order, it is the court's present view that the grand jury having been excused, attorneys for the government are still entitled to the use of the evidence which was produced before the grand jury in the performance of their duties, which I hold to be performance of any act that has for its purpose the charging of any particular persons or corporations in connection with the matters that were under invetsigation by the grand jury; and for that reason they are entitled to use the transcript of evidence together with any photostatic copies which they may wish to make of documents that were produced in the preparation of any informations that they may elect to prepare and file or in further presentations which they may care to make before subsequent sessions of the grand jury, and that is not limited as to whether

the grand jury is the grand jury that we now have or some subsequent grand jury.

Mr. PICKERING: That was one of the questions we wanted to ask, your honor. Mr. Brown said "another grand jury" and we questioned him on that and he was certain that was the word you used, but we doubted very much if that was the court's intention.

The COURT: I think Mr. Brown may have got that impression but it was not my intention. I, of course, am not saying at this time that I would be willing to call this grand jury back into session. I think that I would not be willing to call this grand jury, which has considered the case for a month and taken no action, but I am not precluding that.

Mr. MOORE: Your honor, before we leave the subject of the use of these documents and the transcript, you indicated preparation for an information or further presentation before any subsequent session of the grand jury. I would like to point out to the court that the Federal antitrust laws involve both an election of the government to proceed criminally or civilly and it is our question now whether the court has in mind the government's use of this material should the government desire to proceed civilly.

The COURT: I would say yes, you can use them in that way against particular defendants. My purpose in this limitation on your use of the transcript and the photostats is that, first, the persons whom you now expect to charge may be protected in case they are not charged against the fact that evidence or documents may be outstanding which the government may believe tends to incriminate them in violation of the statute.

So long as you have a bona fide intention to proceed

against them, then I think in the performance of your duties you are entitled to these documents and the transcript, but I do not believe that they should be left outstanding in the hands of anyone, including the Department of Justice, if the intention to prosecute is abandoned. That's with reference to the persons that you now intend to proceed against.

I take it that there may be evidence in the transcript and in the documents with reference to various persons that you have no intention of proceeding against either criminally or civilly, and as to those persons it is my view that they are entitled to be absolutely protected against any outstanding evidence that may have been taken which was directed against them but which turned out to be not sufficient on which to base any charge.

Mr. MOORE: I might say, your honor, that civil action by the government under the antitrust laws seeks only an injunction and it is a civil action, of course. It is not a criminal action. Did I understand your honor to say that that type of action would fall into this category of limited use of these materials?

The COURT: So long as there is a good faith intention to go ahead with it.

Mr. PICKERING: Your honor, I would like to make this point, that it is not, of course, our decision—Mr. Moore's or mine—whether any action should be taken against anyone. That decision is made by our superiors and we can honestly say at this time we have no idea as to whether any action criminally or civilly is going to be taken against anybody or sought to be taken by the Department of Justice.

The Department can't make that decision or won't make any such decision until it has had an opportunity

to study the evidence which is contained in some of the documents and in the transcript, and until the people who make these decisions in the Department have had such an opportunity we would not be able to make any statement to the court to the effect that we had any intention of proceeding against any particular individuals.

We have had no particular individuals or corporations under investigation during this proceeding or before the proceedings started. We only have been seeking to ascertain what the facts were with respect to certain complaints which the Department received concerning alleged violations of the antitrust laws in this area. We have no preconceived notions, we had none and we have none now as to whether anyone may be guilty of violating the antitrust laws. Before we can have any such ideas we need an opportunity to study the evidence which has been produced, and I take it that the court would consider that a worthy purpose for which to use the transcript and any photostatic copies of documents, that is, to determine whether the Department feels any action should be taken in the first place, and, secondly, if it does determine that some action should be taken, then to use that material to prepare proper papers and also to prepare for trial.

The COURT: Yes. I agree with that. I merely point out this to you, Mr. Pickering, that while I can understand that as representatives of the Department of Justice it is necessary for you and Mr. Moore to act on instructions, at the same time insofar as this grand jury is concerned you two gentlemen are the attorneys who have qualified in this court to represent the government before that grand jury.

I have no supervisory control over the Department of Justice as such but I do have supervisory control over you gentlemen so long as you are practicing in this court under the attorneys' oath, and for that reason whatever limitations I place on the use of the transcript and the photostatic copies of documents are limitations upon you gentlemen and it is your responsibility to see that they are observed. I understand, too, of course, that in the use of these transcripts and photostats that other persons in the Department of Justice will no doubt help you and may make the decisions so far as the Department of Justice is concerned but so far as this court and the grand jury, our relationship is with you gentlemen as attorneys.

One other thing. I believe that the letter which I sent to Mr. Pickering and Mr. Moore under date of May 25, 1956, which had to do with the decision on the brief submitted by them with reference to the stenographer's transcript should be incorporated verbatim in the transcript of this proceeding this morning and so I will hand it to the reporter to copy and after copying it may be handed back to Mr. Pickering or Mr. Moore and also these proposed orders if they want them back.

UNITED STATES DISTRICT COURT
Southern District of West Virginia
Charleston 29, West Virginia

Chambers of
Ben Moore, District Judge

May 25, 1956.

Harry E. Pickering, Esq.,
Attorney at Law

Frank B. Moore, Esq.,
Attorney at Law

Gentlemen:

I have reached the following conclusion with reference to your contention that you are entitled to a transcript of the stenographer's notes of Grand Jury proceedings in the Grand Jury's current investigation of the dairy business in this vicinity to determine whether or not any persons or corporations are engaged in violations of the antitrust laws.

The brief which was submitted to me on yesterday has been read and considered, and I have also given careful independent thought to the merits of your contention.

1. I do not agree that the stenographer's notes belong to the prosecuting, or executive arm of the government. The Grand Jury is in the judicial branch of government, and it is highly important to the rights of the individual citizen that the distinction between the powers, duties, and rights of the two coordinate branches of government be maintained. The ultimate right to its record of proceedings resides in the Grand Jury under the supervision and guidance of the Court.

2. I do agree with you gentlemen that it is proper for you to have from the stenographer a transcript of the evidence for the purpose of carrying out the duties which you list on page 5 of your brief, namely: "1) the conduct of a thorough investigation; 2) the preparation of the indictment; and 3) preparation for trial."

3. You will be permitted therefore to receive from the stenographer a transcript of the evidence taken down by him, for the purposes mentioned. This means that if indictments are returned by the Grand Jury you will be permitted to retain the transcript insofar as it relates to persons or corporations then under indictment, for use in preparing for trial and prosecuting the cases to a conclusion. However, if no indictments are found by the Grand Jury or if certain persons or corporations under investigation are not indicted, the transcript relating to such persons or corporations as are not indicted will be returned to the Clerk of the Court as custodian thereof for the Grand Jury.

4. During the use of the transcript by counsel for the government prior to indictment, it shall be kept strictly confidential, and no copies made thereof.

5. Your receipt of a transcript from the stenographer will constitute your acceptance of the conditions as to its use which are set out above.

6. My chief reason for holding that the transcript prior to indictment (or with reference to any persons or corporations not indicted) shall remain undisclosed is my belief that if the Grand Jury, after full and fair investigation, decides not to indict a particular person or corporation, it is not in the interest of justice that testimony which reflects on the character of that person

or corporation be left in the hands of anyone, including representatives of the executive department of government.

Yours truly,

(Signed) BEN MOORE,
United States District Judge.

Copy to:
MR. R. L. STEVENSON,
Charleston National Bank Building,
Charleston, West Virginia.

June 1, 1956, at 3:30 p.m.:

The COURT: All right, gentlemen, go ahead.

Mr. MOORE: If your honor please, in accordance with the proceedings this morning we have prepared an order which your honor suggested this morning which incorporates the entire record of the proceedings and we have also prepared an order for impounding the documents so that we can have those photostats made. I will consider this an oral application for the impounding order and I will submit the impounding order first for your honor's consideration. (Handing paper to the court)

The COURT: The grand jury is not in recess, Mr. Moore. The grand jury is excused.

Mr. MOORE: We will be willing to amend the order to that extent.

The COURT: The amendment should be that the grand jury is not in session. With the exception of what I have mentioned I see nothing wrong with this order, except one particular. It seems to be the implication of the order that these documents are to be held in custody for a long time. I don't think I gave that im-

pression to the attorneys. I told you that you would have a reasonable time within which to make photostats.

Mr. MOORE: In the interest of leaving that flexible and leaving that up to your honor to be able to return those documents, not knowing what the date would be, we felt that leaving it up to the court, as it says, "until further order of the court," I believe that that would take care of that situation and your honor could release the documents at such time as he saw fit.

The COURT: If you understand it that way, that all I am doing is giving you gentlemen a reasonable time in which to photostat them, and if you don't get them photostated within what we will all consider a reasonable time, then I am going to turn them back to the owners.

Mr. MOORE: We didn't know what to do as far as a date was concerned, so we thought we would leave it up to your honor to decide what that reasonable time was.

The COURT: What else do you have to present?

Mr. MOORE: We have the order covering the entire proceedings held in open court pursuant to the grand jury investigation.

The COURT: With a slight change I am willing to sign this order. "The grand jury was excused from further meetings unless ordered by the court." You have "until ordered by the court." Then you speak of oral orders or rulings of the court. The orders or rulings that I make from the bench which are transcribed by the reporter are just as formal as any others and I wouldn't be willing to designate them as oral orders, but I intend to make the transcript a part of the order.

Mr. MOORE: Would your honor be willing to amend that order clause to read, "It is hereby ordered that the orders and rulings of the court in the course of" et cetera and delete the word "oral"?

The COURT: That's right.

Mr. MOORE: That's agreeable.

The COURT: Just delete the word "oral" and instead of "until" we will say "unless."

Mr. MOORE: All right, your honor.

The COURT: Are there any other matters you have to present?

Mr. PICKERING: Your honor, I would like to make two motions at this time or suggestions that the Department feels are quite important. First we would like to move the court to reconsider its orders imposing conditions on the government's use and retention of the transcript of the grand jury proceedings. We have submitted a brief on this subject and there has been some discussion in court and we don't propose to renew the argument.

* * * * *

Mr. PICKERING: One more motion that the government would like to make at this time, your honor. When the grand jury reported to the court, I believe one day last week and early this week, the resolutions which they read and the comments which they made indicated that the jury wished to continue the investigation which it was conducting at a later date; they wished to recess for a period of time.

The government at this time respectfully moves the court that it issue appropriate orders and instructions to the effect that the present grand jury reconvene on

or about September 15th, 1956 for the purpose of considering further matters which the United States may wish to bring to its attention relating to the subject of the investigation which it had been conducting during the period from about April 30th, 1956 to about May 29th, 1956.

That's the text of the motion. I would like to make this one comment, that the reason we are making this motion is because of the fact that this jury, as the court observed, has spent a good deal of time with this investigation. It is familiar with the industry, it is familiar with the practices and it is familiar with the witnesses that have testified before it. We feel it would be a great loss of time to the government and to the court if this matter had to be brought up again before a new grand jury, and while it would not be necessary to call in the same large number of witnesses before a new grand jury if the government felt that it wished to present indictments for its consideration, it would be necessary to call a number of witnesses and it would be necessary to spend a number of days going over evidence which this present grand jury has already considered. Therefore, we feel it would be in the interest of justice and economy of time and money if the court would permit and order this present grand jury to be reconvened at a time on or about September 15th. We used that date because we didn't know what date your honor would be back in this city for further consideration of these matters.

The COURT: It is my opinion, as I told the grand jurors themselves before I dismissed them, that it could not possibly be in the interest of justice to have a group of men reassemble after a recess of four months,

during which time they have all been occupied with their own affairs, and expect them at that time to be able to do justice on the basis of evidence they heard during the thirty days in which they were in session.

I, as you gentlemen know, went as far as I felt it was proper for me to go in urging the grand jury to take some action either in voting indictments or in voting no true bills before they were dismissed, and the grand jury elected simply to say that they were not prepared to take any action at that time. They knew when they said that that I had already expressed the view that a recess of four months was not in the interest of justice and they said in their resolution that they asked to be excused or words to that effect, and then I excused them; so I am sure that none of these men would expect to read over the transcript of the testimony that was taken during the month of May if they were to come back in September.

Even if they would at that time read over the transcript of the testimony they would not be in as good a position to make decisions with reference to that testimony as they were when it was fresh on their minds, and since I am sure that it would be improper for the grand jury to consider only such digests or excerpts of that testimony as might be presented by counsel for the government if they were to meet again without considering everything else that had been testified to before the grand jury, since I am sure that justice would not permit that kind of consideration of evidence by a grand jury, I also believe it is not in the interest of justice to call these men back.

I am not saying at this time that I will not call them back when the time comes; if counsel can show me a

good reason at any time for calling a grand jury into special session I will do it, just as I called this one at the request that you gentlemen made. It was represented to me in the beginning that the session of the grand jury would take about two weeks and it actually took a month. I believe that I held the grand jury as long as the grand jury should be held and so I will deny the motion.

I am going to change one other word in the order. The order as written contains this paragraph: "Whereas said grand jury was excused by the court on May 29, 1956 from further meetings until ordered by the court". I am going to change the word "meetings" to "service" because that's actually what was done. They are the grand jury but they are excused from further service unless ordered by the court. That's all.

Mr. PICKERING: That's all we have, your honor.

ORDER

Whereas Harry E. Pickering and Frank B. Moore, Attorneys for the United States of America, have been duly authorized by the Attorney General of the United States to conduct certain Grand Jury and other legal proceedings within this District and have been duly sworn by the Clerk of this court; and

Whereas a Grand Jury began on or about April 30, 1956 to investigate suspected violations of the Antitrust Laws of the United States, particularly the Sherman Act (15 USCA 1-7); and

Whereas said Grand Jury was excused by the Court

on May 29, 1956 from further service unless ordered by the Court; and

Whereas, from time to time court proceedings were held for the purpose of resolving questions arising out of said Grand Jury proceedings; and

Whereas such court proceedings were transcribed and the transcripts are attached hereto and made a part hereof.

IT IS HEREBY ORDERED that the oral orders and rulings of the Court in the course of the aforementioned court proceedings, as revealed by the entire transcript of said proceedings, are hereby adopted as the formal orders of this Court.

ENTER: June 1, 1956.

s/ BEN MOORE,
District Judge.

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No. 613

IN THE

Supreme Court of The United States

October Term, 1956

VALLEY BELL DAIRY CO., INC., et al,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

Upon Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF PETITIONERS IN REPLY TO BRIEF IN OPPOSITION OF THE UNITED STATES

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---

BRIEF OF PETITIONERS IN REPLY TO BRIEF IN OPPOSITION OF THE UNITED STATES

INTRODUCTORY STATEMENT

While it is believed that the petition is of itself a refutation of the Government's brief in opposition, this reply brief is filed for the purpose of further clarifying the issues presented.

STATUTES INVOLVED

The statute conferring upon Courts of Appeals jurisdiction of appeals from final decisions of District Courts, 28 USC, Sec. 1291, reads as follows:

> "§ 1291. *Final decisions of district courts*
>
> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

The statute conferring upon Courts of Appeals jurisdiction of appeals from certain interlocutory decisions of District Courts, 28 USC, Sec. 1292, reads as follows:

> "§ 1292. *Interlocutory decisions*
>
> "The courts of appeals shall have jurisdiction of appeals from:
>
> "(1) Interlocutory orders of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;
>
> "(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes

thereof, such as directing sales or other disposals of property;

"(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

"(4) Judgments in civil actions for patent infringement which are final except for accounting."

STATEMENT*

In the Government's statement (GB 4) it is said that a few days after the grand jury was charged by Judge Moore on April 30, 1956, the petitioner, Valley Bell, moved to quash, in part, the subpoena duces tecum served upon it. As a matter of record, Valley Bell's motion to quash was first made prior to the re-convening of the grand jury and prior to Judge Moore's giving the charge (P 10; TR 10, 11, 15, 28, 29).

In the Government's statement (GB 5) it is said that the District Court ruled that the Government must show the materiality of the information sought by the subpoena duces tecum, but the Government does not, in its brief, point out that Judge Moore had stated (GA 4),

> "The court is not going to permit in this or any other case a wholesale investigation that is not grounded on some reasonable belief. The grand jury has complete investigative powers

*Note: "P" will refer to Petition; "TR" to Transcript; "GB" to Government's Brief; and "GA" to Government's Appendix. Unless otherwise noted, emphasis is that of counsel.

> but is not justified in making examinations into private business unless there is a starting point, that is, unless there is a belief based on some reasonable facts known to the government that there is ground for that investigation, and if there is such a belief the investigation must be given such scope as will produce all the material information.
>
> "If counsel for either side do not agree with those principles you had better say so now so that we can clear them up.";

and that, in response to said statement, Mr. Moore, one of the government attorneys, had said (GA 5):

> "Mr. MOORE: If your honor please, I am in complete agreement. The government is in complete agreement with the principles as you state them. * * *".

In the Government's brief (GB 5), it is said:

> "* * * The court, in granting the motion, emphasized that the subpoena had issued before the grand jury had begun hearing evidence, and said that if the grand jurors should ask for the documents 'they will probably get them' (*id.*, pp. 8-9). However, when the grand jury later reported that it had voted overwhelmingly to have the documents produced (*id.*, p. 12), the district judge characterized this action as being 'just an attempt to circumvent the order of the court,' and granted a renewed motion to quash (*id.*, p. 32)." ("*id.*" refers to the Government's Appendix.)

But the statement does not show that Judge Moore referred to the "attempt to circumvent the order of

the court" only after he had ascertained that the request and vote of the grand jury was initiated by the government attorneys and that the written request had been prepared by the government attorneys in advance of the grand jury's consideration of its interest in the designated records (GA 10, 14) and after the foreman of the grand jury had stated that the government attorneys had given no reasons why they wanted the records (GA 12).

ARGUMENT

THERE BEING NO CASE, CONTROVERSY, OR LITIGATION, BUT ONLY AN INQUIRY, IN THE DISTRICT COURT, THERE WAS NO CASE, CONTROVERSY, OR LITIGATION IN RESPECT TO WHICH THE COURT OF APPEALS HAD POTENTIAL APPELLATE JURISDICTION; AND HENCE THE COURT OF APPEALS WAS WITHOUT JURISDICTION TO AWARD MANDAMUS UNDER THE "ALL WRITS ACT", 28 USC 1651.

The Government concedes (GB 9) that the jurisdiction of Courts of Appeals is exclusively appellate. The Government must also concede that the orders of Judge Moore directed by the Court of Appeals to be vacated are not final decisions within the meaning of 28 USC, Sec. 1291, or interlocutory decisions within the provisions of 28 USC, Sec. 1292, which are the only provisions from which Courts of Appeals derive their general appellate jurisdiction. Certainly, no special appellate jurisdiction of the Courts of Appeals is here involved.

The petitioners do not question that the "All Writs Act" is available to Courts of Appeals in respect to

pending cases, controversies, and litigation prior to the time when an appeal may be sought or may be perfected. But the petitioners respectfully insist that there must be a case or controversy or litigation in respect to which there is potential appellate jurisdiction before the "All Writs Act" is available to Courts of Appeals. Mere potential litigation is not sufficient to support potential appellate jurisdiction.

Save for the very decision of the Court of Appeals for the Fourth Circuit for the review and reversal of which the petition herein was presented, the respondent cites no authority whatever for the use of the "All Writs Act" by the Court of Appeals to review the orders of a District Court made in connection with a mere grand jury inquiry. It is believed that there is no such authority.

The Government's Authorities Do Not Support The Claim Of Jurisdiction Of The Court Of Appeals

The Government, in Part I of its argument, commencing at page 9 of its brief, cites or refers to the cases hereinafter briefly commented upon, not one of which, however, sustains the Government's position.

In *Roche* v. *Evaporated Milk Association*, 319 U. S. 21, there was litigation, an indictment to which the defendant had filed a plea in abatement which the District Court had stricken. The Court of Appeals, by mandamus, sought to require the District Court to reinstate the plea in abatement. Upon certiorari, the Supreme Court of the United States reversed the Court of Appeals, holding that mandamus did not there lie.

In *Ex parte Peru*, 318 U. S. 578, there was litigation. A libel had been filed in the District Court against a vessel owned by the Republic of Peru. The Supreme Court of the United States, without waiting for the case to reach it through the usual appellate procedures, upon motion for leave to file a petition for a writ of prohibition and/or mandamus decided that the libel should be dismissed for the reason that the Republic of Peru, being a foreign nation, enjoyed immunity from suit, the controversy calling for diplomacy rather than litigation.

In *Ex parte United States*, 287 U. S. 241, there was litigation. An indictment had been returned and the District Judge had declined to issue a bench warrant. The Supreme Court of the United States awarded the writ of mandamus requiring the issuance of the warrant. The late Mr. Chief Justice Stone, in referring to this case in his opinion in *Roche* v. *Evaporated Milk Association*, 319 U. S. 21, 31, referred to the writ of mandamus in *Ex Parte United States* as simply requiring the performance of "a plain ministerial duty".

In *United States* v. *United States District Court*, 334 U. S. 258, there was litigation—the well-known Aluminum Company of America antitrust action. The Court of Appeals, which had reviewed the case under a special act of Congress conferring jurisdiction because of the want of a quorum of the Supreme Court of the United States, had disclaimed jurisdiction to issue mandamus to require the District Court to comply with the mandate of the Court of Appeals, in the belief that the jurisdiction of the Court of Appeals under the special act had ended. Upon certiorari, the Supreme Court of the United States held that the Court of Appeals had

jurisdiction and of course mandamus was proper to require compliance with the mandate.

In *Chicago, R. I. & P. R .R.* v. *Igoe*, 220 F. (2d) 299, referred to by the Government in the footnote on page 11 of its brief, there was litigation—an action against the railroad for wrongful death. The case involved a motion to transfer the action to another district. The District Court had declined to order the transfer. The Court of Appeals by mandamus ordered the District Judge to enter an order effecting the transfer, but not, however, without strong dissent. Circuit Judge Finnegan strongly dissented and characterized the decision of the majority of the court as usurpation (220 F. (2d) 306). That this Court denied certiorari (350 U. S. 822) does not necessarily mean that this Court approved the decision of the Court of Appeals. However that might be, there was a pending case—litigation.

Hale v. *Henkel*, 201 U. S. 43, involved litigation, but not the use of the "All Writs Act" in aid of appellate jurisdiction, either actual or potential. The case was *on appeal* to the Supreme Court of the United States from the Circuit Court of the United States for the Southern District of New York which had denied habeas corpus to the petitioner who had been committed for contempt for refusing to give testimony before a grand jury.

Cobbledick v. *United States*, 309 U. S. 323, did not involve the "All Writs Act". The District Court had denied a motion to quash a subpoena duces tecum and the petitioners had sought a review of the ruling of the District Court *by appeal* to the Court of Appeals. The Court of Appeals found itself to be without jurisdic-

tion, because the order sought to be reviewed was not a final order. The Supreme Court of the United States granted certiorari because of conflict of decisions of Courts of Appeals and, upon certiorari, affirmed the Court of Appeals upon the ground that the rulings upon the motion to quash the subpoena duces tecum were not appealable. (In the Petition, p. 23, by inadvertence, the *Cobbledick* case was referred to as considering mandamus.)

In this connection, while citing the *Cobbledick* case which held that the ruling upon the motion to quash the subpoena duces tecum was not appealable, the Government here asserts the right to have reviewed by the Court of Appeals by mandamus, among other things, a ruling of the character which this Court, by the *Cobbledick* case, has held not to be reviewable upon appeal. If this ruling is not appealable, then it cannot support the potential appellate jurisdiction of the Court of Appeals necessary to sustain jurisdiction under the "All Writs Act". And the Government takes this position, notwithstanding the well settled principle that mandamus is not a substitute for appeal and is not an appropriate proceeding by which to review judicial action. (See, among many, *Ex parte Newman*, 14 Wall. 152; *In re Hawkins*, 147 U. S. 486; and *Bankers Life & Casualty* v. *Holland*, 346 U. S. 379, 383.)

Further, in this connection, it is interesting to note again, as was done in the petition, that in his appearance before the District Court on October 12, 1956, Mr. Kramer, one of the government attorneys, stated: "* * * so that while the style of this proceeding in the Court of Appeals is that of mandamus, in practical effect it is really a normal adversary proceeding between counsel for the dairy company subpoenaed and

counsel for the government * * *" (P 23; TR 248-9). Yet, in seeking the mandamus, the government attorneys made parties to the action only the District Court for the Southern District of West Virginia and The Honorable Ben Moore, Judge of said Court—and none of the petitioners here who were there under investigation.

Costello v. *United States*, 350 U. S. 359, is referred to in the Government's brief. This case did not involve the "All Writs Act" or any issue of the case at bar. It was upon appeal, not mandamus, and involved only the question of whether a valid indictment might be found upon the basis of hearsay evidence.

The foregoing are all of the cases referred to by the Government in that part of its brief relating to the jurisdiction of the Court of Appeals to award mandamus in the case at bar, and it is respectfully submitted that not one of the cases offers the slightest precedent for jurisdiction of Courts of Appeals to use the "All Writs Act" in respect to a mere inquiry out of which no actual litigation has arisen; in other words, at the most, mere potential litigation.

Absence of Other Remedies Does Not Create Jurisdiction In Mandamus

But the Government says that if the Court of Appeals is without jurisdiction to award the writ of mandamus, then there is no available corrective action within the federal judicial system by which the Court of Appeals might review actions of the District Judge which the Government would seem to regard as erroneous.

With the exception of the Supreme Court of the United States, all federal courts are statutory courts. They have such jurisdiction, and only such jurisdiction, as the Congress has seen fit to confer upon them. If the Congress should be persuaded to believe that the District Courts are abusing their jurisdiction in respect to grand jury investigations, the Congress could very readily confer upon Courts of Appeals supervisory jurisdiction over District Courts in respect to grand jury proceedings, or, for that matter, general supervisory powers over the District Courts in the exercise of all of their jurisdictions. But certainly the absence of what some persons might regard as a desirable remedy, or desirable jurisdiction for Courts of Appeals, does not create in the Courts of Appeals jurisdiction which the Congress has not seen fit to confer.

It is one thing to say that mandamus lies only when there is no other remedy. It is quite another thing, and entirely erroneous, to say that mandamus always lies when there is no other remedy.

In *Ex parte Newman*, 14 Wall. 152, at 168, it is observed: "Confessedly the petitioners are without remedy by appeal or writ of error, as the sum or value in controversy is less than the amount required to give that right, and it is insisted that they ought on that account to have the remedy sought by their petition. *Mandamus* will not lie, it is true, where the party may have an appeal or writ of error, but it is equally true that it will not lie in many other cases where the party is without remedy by appeal or writ of error. * * *" (See also *In re Burdett*, 127 U. S. 771; *In re Key*, 189 U. S. 84, 85; and *In the Matter of Park & Tilford*, 245 U. S. 82, 86.)

The Government in Part II of its argument (GB 13) again asserts that the absence of other remedies is a consideration strongly supporting mandamus, but the case of *Ex parte Peru* there referred to does not support the assertion. In *Ex parte Peru*, there was another remedy, appeal to the Court of Appeals. In fact, Mr. Justice Frankfurter dissented for the very reason that he thought the usual remedy of appeal should have first been resorted to before seeking prohibition or mandamus from the Supreme Court of the United States.

It is, therefore, obvious that the existence or absence of another remedy is no criterion for determining the existence or absence of the right to mandamus. The absence of a remedy no more confers jurisdiction than does the presence of a remedy take it away. Either there is jurisdiction or there is not, and the petitioners insist that there is no jurisdiction in mandamus in the Court of Appeals under the facts of this case.

EVEN IF THE COURT OF APPEALS HAD JURISDICTION, IT COULD NOT, BY MANDAMUS, SUBSTITUTE ITS OPINION AS TO WHAT IT WOULD HAVE DONE IF IT HAD BEEN THE DISTRICT COURT FOR THE DECISIONS WHICH THE DISTRICT COURT MADE IN THE EXERCISE OF JUDICIAL DISCRETION WITHIN ITS ACKNOWLEDGED JURISDICTION.

The Government (GB 13) likens the writ of mandamus to "equitable remedies". It may be that there is an element of discretion in granting or withholding relief sought by each procedure. But certainly all likeness between mandamus and equitable remedies ends there. Mandamus is not an equitable remedy. To the contrary, it is a writ at law which this Court has char-

acterized as drastic and one which should be used only under really extraordinary circumstances. (See *Ex parte Fahey*, 332 U. S. 258, 259-260; *Ex parte Collett*, 337 U. S. 55, 72.)

The District Court Acted Within Its Jurisdiction.

In their petition, the petitioners have demonstrated that the District Court had jurisdiction of the several matters in respect to which the orders complained of by the government attorneys were entered. Rule 6(g) Federal Rules of Criminal Procedure gives unrestricted jurisdiction to discharge the grand jury. Rule 17(c) of the Federal Rules of Criminal Procedure expressly provides for a motion to quash a subpoena duces tecum. Rule 6(e) of the Federal Rules of Criminal Procedure gives the District Court clear jurisdiction in respect to the preservation of the secrecy of the grand jury proceedings, which would certainly include the testimony taken by the grand jury.

The Government in its brief has not questioned that District Courts do have powers and duties in respect to grand jury investigations (see Petition 19-21) and has not questioned the jurisdiction of the District Court in any one of the above-mentioned subject matters. Apparently the Government concedes the existence of the District Court's jurisdiction in respect to all of the rulings made by the District Court.

Mandamus Not Available To Review Judicial Action Had In The Exercise Of Legitimate Jurisdiction.

In its brief the Government has wholly and completely ignored the decisions of this Court that mandamus cannot be used to review judicial action had in

the exercise of legitimate jurisdiction (see Petition 24-25 and the quotations there presented from the *Burtis*, the *Hawkins*, and the *Park & Tilford* cases); although that is exactly what the Government has asked the Court of Appeals to do, and what the Court of Appeals has done; namely, substitute its beliefs for the discretion and rulings of the District Court exercised and made within the scope of the legitimate jurisdiction of the District Court.

This reply brief will not be so extended as to comment upon all the statements made and cases cited in Part II of the Government's argument, though many of the cases cited are wholly without application to the issues here involved. The observations which follow herein are prompted by the Government's argument.

On page 14 of the Government's brief, in discussing the action of Judge Moore in excusing the grand jury, it is said:

> "* * * In short, the orders of the District Judge both impeded progress of the grand jury's investigation and foreclosed later investigation by it. Under the *decisions*, this was 'a clear invasion of the grand jury's powers' * * *",

but the Government cites not a single decision to sustain that broad charge, other than that of the Court of Appeals for the Fourth Circuit in the case at bar, for the review and reversal of which the petition herein has been presented.

Grand Jury Is Subject To Fourth Amendment To Constitution.

The petitioners do not question that a grand jury has great independence and much latitude in its investigation of crimes; but, as has been pointed out, the grand jury is an instrumentality or agency of the court and is neither an independent planet nor a tool of government attorneys (see Petition pp. 19-20). And even a grand jury is not exempt from the application of the Fourth Amendment to the Constitution of the United States which gives security against unreasonable searches and seizures and which provides that warrants shall issue only upon probable cause.

That a subpoena duces tecum is a process within the objectives of the Fourth Amendment is demonstrated by the cases, among many, of *Essgee Co.* v. *United States*, 262 U. S. 151, and *Brown* v. *United States*, 276 U. S. 134, the considerations of which are aptly summarized in *In re Grand Jury Investigation*, 33 F. Supp. 367, at 370, by the statement:

> "A subpoena duces tecum is a 'process' within the meaning of the Fourth Amendment, whose validity is tested by its reasonableness in the circumstances of the case. * * *."

A showing of probable cause was all that was asked of the government attorneys by Judge Moore prior to his ruling on the motion to quash the subpoena duces tecum, and that the government attorneys refused to make, notwithstanding the fact that the government attorneys had procured the subpoena duces tecum prior to the re-convening of the grand jury.

On page 15 of its brief, the Government refers to the case of *United States* v. *Thompson*, 251 U. S. 407, but that case did not involve the "All Writs Act". The jurisdiction of the Supreme Court of the United States there was under direct writ of error, pursuant to the Federal Criminal Appeals Act. Nor did any of the other cases there cited by the Government, *Costello*, *Johnson*, or *Blair*, involve the exercise of jurisdiction under the "All Writs Act". All of those cases involved appeals and writs of error.

The Limitations On Possession And Use Of Transcript.

In respect to the limitations placed upon the possession and use of the transcript of the evidence taken before the grand jury, it is well known that Rule 6(d) of the Federal Rules of Criminal Procedure (following the Act of May 18, 1933, 48 Stat. 58, 18 USC, Sec. 556 (1940 ed.)) was adopted to dispose of the question, on which there had been conflicting decisions, of whether the presence of a stenographer in the grand jury room violated the rules of secrecy and invalidated such indictments as might be returned. Neither the statute nor the rule purports to prescribe the disposition of the transcript of the evidence.

The Government (GB 16-17) refers to the case of *In re District Attorney*, 7 Fed. Cas. 745, 746, in support of its statement: "Judicial decisions, both before and after the 1933 statute, are unanimous in holding that the Government is entitled to retain, without restrictions or conditions, the transcript of testimony taken before a grand jury. * * *"

In re District Attorney lacks much of sustaining these broad assertions. This case involved an inquiry of the court by the grand jury concerning the disposition which should be made of the grand jury minutes and of the transcript of the evidence taken before it after it had completed its deliberations. The judge instructed the grand jury, in respect to the minutes and transcript, that: "They should be delivered to the district attorney, and by him kept among the records of the government. *They are necessary to enable him to prosecute offenders.* Should he be excluded from the jury room and refused the inspection of your minutes of the testimony, the public business of his department could not be conducted; there would be no possible means for the prosecuting attorney officially to learn large classes of facts indispensable to *the performance of his duty as public prosecutor.*"

While Circuit Judge Emmons, in giving that instruction, did not phrase it in terms of limitations and restrictions, his instruction was in substance the same as the ruling of Judge Moore. Judge Emmons' instruction made it clear that the transcript was to be delivered to the district attorney for use by the district attorney as prosecutor upon the indictments rendered. Such need was the only reason for preserving the minutes and transcript and the only reason for delivering them to the district attorney.

Judge Moore ruled that the government attorneys (who were not district attorneys of Judge Moore's district) could have the transcript and use it for the purpose of conducting a thorough investigation and, if indictments were returned, could use it in their prosecution of the cases (P 5a). Those were the very purposes for which Judge Emmons in *In re District At-*

torney advised the grand jury that the minutes and transcript should be lodged with the District Attorney.

There is another aspect in respect to which *In re District Attorney* falls far short of sustaining the position of the government attorneys in the case at bar. In *In re District Attorney*, the minutes and transcript were directed to be delivered to the district attorney—obviously the district attorney for the district within which the grand jury was sitting. The minutes and transcript would remain within the district of the jurisdiction of the District Court and would be subject to the orders of the District Court. In the case at bar, the government attorneys admittedly proposed to remove the transcript from the jurisdiction of Judge Moore's district and where, likewise admittedly, it would be beyond the reach of Judge Moore's orders (TR ...., Hearing October 12, 1956, pp. 5 and 6).

Furthermore, while the record is replete with observations by Judge Moore that he did not believe that subpoenae duces tecum for the production of evidence before the grand jury should, at least in the absence of indictment, be used for purposes of a civil action, the government attorneys repeatedly and consistently failed or refused to disclaim any purpose of using the transcript for the purposes of a civil action (TR ...., October 12, 1956, pp. 12-13).

The Government (GB 17) also refers to *United States ex rel McCann* v. *Adams*, 3 F.R.D. 396. The *McCann* case simply followed *In re District Attorney*, quoting therefrom at length, in overruling an objection that the minutes of the grand jury were turned over to the United States Attorney rather than to the Clerk of the Court. From the opinion, it clearly appears that

the United States Attorney referred to was the District Attorney.

The Cain Case

It is, of course, true that *Cain* v. *United States* (P 37a-55a) dealt with the facts of that case, as the Government insists. Such is true of cases generally. But that does not dilute the fact that in the *Cain* case it was clearly held that a District Court does have the power and duty to see that its processes for the production of evidence before a grand jury are not subverted to purposes other than the lawful purposes of the grand jury. That is the principle which Judge Moore applied in imposing limitations upon the possession and use of the transcript of the evidence here under consideration; and that is the principle which the Court of Appeals for the Fourth Circuit rejected in awarding the writ of mandamus, compliance with which would have resulted in the government attorneys receiving, without any limitations or restrictions of any character, the transcript of the evidence, and using such transcript for any and all purposes, criminal or civil, which they or their superiors may have seen fit, in the Southern District of West Virginia or elsewhere, likewise without any limitations or restrictions. This decision of the Court of Appeals for the Fourth Circuit in the case at bar is clearly in conflict with the decision of the Court of Appeals for the Seventh Circuit in the *Cain* case.

The Quashing, In Part, Of The Subpoena Duces Tecum

With respect to the direction of the Court of Appeals to Judge Moore to vacate his order quashing, in part, the subpoena duces tecum, the Government refers to

Brown v. *United States*, 276 U. S. 134. The *Brown* case did not involve the ruling of the District Court upon a motion to quash a subpoena duces tecum. The *Brown* case did not involve the use of the "All Writs Act". There was no motion to quash in the *Brown* case. The petitioner simply refused to produce the evidence demanded and was convicted of contempt. He appealed to the Court of Appeals, which certified the question to the Supreme Court of the United States.

A motion to quash is the ordinary procedure provided by Rule 17(c) of the Federal Rules of Criminal Procedure to have the judge rule upon the sufficiency and appropriateness of the subpoena duces tecum. Brown did not seek the ruling of the court before refusing to produce the evidence sought.

In the absence of a motion to quash, a subpoena duces tecum calling for the production of records may be fair upon its face, so far as the materiality of the records is concerned. But when the materiality of the records is directly challenged by a motion to quash, as was done by the petitioner Valley Bell in the case at bar, there must be some showing of materiality, as was held in *Hale* v. *Henkel*, 201 U. S. 43, at 77, wherein it was observed:

> "* * * Doubtless many, if not all, of these documents may ultimately be required, but some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or *some evidence of their materiality produced*, to justify an order for the production of such a mass of papers. * * *"

On this principle, with which the government attorneys had fully agreed (GA 5), Judge Moore simply took judicial action within his acknowledged jurisdiction.

CONCLUSION

For the reasons stated in the Petition and in this Reply Brief, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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